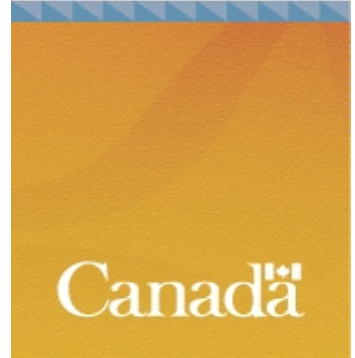




Indian and Northern  
Affairs Canada

Affaires indiennes  
et du Nord Canada

# LAND MANAGEMENT MANUAL



Canada

# INDEX TO CHAPTER 1

## INTRODUCTION

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# Using the Manual

## Directive 1-1

### 1. Purpose

- 1.1 This manual is based on the final recommendations of a committee composed of district, regional and headquarters staff, as well as First Nation Land Managers. Their goal was to produce a manual that reflects user needs and is easy to read and use. We hope that this manual achieves these goals.
- 1.2 This directive describes the structure and format of the manual and explains how to use the manual.

### 2. General

#### 2.1 What is the manual?

- a) **It is a resource and a tool.** It has all of the basic technical information, procedures and policies you will need to manage reserve land. There is an updating system to ensure that the information you have is current.
- b) **It is also a product,** backed by the Land Planning Unit which acts as "a service unit." Services include directives, special projects and consultations in response to new issues and questions.

#### 2.2 Who is the manual for? It is designed to assist three user groups:

- a) The department's officers who manage Indian reserve and designated lands;
- b) First Nation officers who manage Indian reserve and designated lands; and,
- c) Other departmental officials.

- 2.3 **What can the manual do?** The manual will provide you with:
- a) General information on reserve lands;
  - b) Specific procedures;
  - c) Policy information; and,
  - d) Updated interpretations and amendments.
- 2.4 **The manual is divided into chapters.** Each chapter is divided into directives which are then subdivided into headings, paragraphs and bullets.
- 2.5 **The manual contains two indexes:**
- a) The **main index**, found at the front of the manual, lists the manual's chapters, directives, and attachments.
  - b) The **chapter index**, found at the beginning of each chapter, lists the directives in numerical order.
- 2.6 **The manual has 15 chapters:**
- a) Chapter 1: Introduction
  - b) Chapter 2: Transaction Guide
  - c) Chapter 3: Individual Interests: Creating, Transferring and Cancelling
  - d) Chapter 4: Lands Used for the General Welfare of the First Nation
  - e) Chapter 5: Designations and Surrenders
  - f) Chapter 6: Permits: Drafting, Issuing and Cancelling
  - g) Chapter 7: Leases: Drafting, Issuing and Cancelling
  - h) Chapter 8: Monitoring and Administering Leases and Permits
  - i) Chapter 9: Land Transactions Under Section 35
  - j) Chapter 10: Reserve Creations and Additions

- k) Chapter 11: Devolution of Land Management to First Nations
- l) Chapter 12: Environment
- m) Chapter 13: Orders in Council
- n) Chapter 14: New Bands/Band Amalgamations
- o) Chapter 15: First Nation Land Management Act

2.7 Each chapter is divided into **directives** that deal with key issues. Directives are divided into these headings:

- a) Purpose: Objective of the directive.
- b) General: Background, definitions, explanations and rationale.
- c) Authorities: Relevant sections of the Act, regulations, other legislation and case law.
- d) Policy: Policy requirements.
- e) Process: Procedural requirements, and an overview or summary of procedures.
- f) Implementation: Date of coming into force, application, roles and responsibilities.
- g) References: Other sources of information, including other manuals.

2.8 **Check lists** are used to explain processes and procedures. You will find a check list at the end of the directives labelled as annexes. Check lists help to explain the process and procedures step by step.

2.9 **Checklist boxes** are included in the check lists, to allow you to check off the requirements or specifications that need to be met in completing a particular step.

2.10 **We have tried to use clear and simple language.** Where technical terms are unavoidable, they are defined either in the text or in a paragraph under the "General" heading.

### **3. Process: How to Use the manual**

#### **3.1 How to Find General Information:**

- a) Start with Chapter 2. It provides background information and explains how different sections of the *Indian Act* are intended to accomplish different purposes.
- b) Find specific topics using the chapter index.
- c) Use the check lists for an overview.
- d) Update all information by reading related directives.

#### **3.2 How to Find Procedures:**

- a) Use the Table of Contents or the chapter list (see section 2.6) to find appropriate chapter(s).
- b) Use the chapter index to find specific directives.
- c) Read the "Process" sections and the check lists. The check lists give step-by-step explanations of procedures.

#### **3.3 How to Find Answers to Policy Questions:**

- a) Use Chapter 2 and chapter indexes to find your subject.
- b) Read the policy sections of directives.

### **4. References and Getting Help**

- 4.1 The "References" heading lists other sources of information, including other departmental manuals. Some of these sources are listed in Directive 1-2, section 6 (References).
- 4.2 You can contact the Land Planning or Land Management units if you have questions about the manual. Contact numbers are listed in Directive 1-2, section 5 (Implementation).
- 4.3 You can also refer questions to regional or district offices, who may, depending on the nature of the question, refer the matter to Headquarters.

- 4.4 Copies of this manual are available from Indian and Northern Affairs Canada regional offices or from the Lands Directorate at headquarters. The manual is also available to government offices and to First Nations with delegated land management authority. First Nations funded for land management should ensure that they are on the mailing list for manual updates. The manual is also available on the departmental Internet and Intranet sites.



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# Policy Development Directive 1-2

## 1. Purpose

1.1 This Directive explains how policy is developed.

## 2. General

2.1 Policy development involves **review** and **consultation**.

2.2 **Review** is a process where draft policies are sent to stakeholders for review and comment.

- a) **When?** Always, except for urgent cases.
- b) **Who?** Policy and advisory units;  
First Nations and regions;  
Other affected groups such as the National Aboriginal Land Managers Association (NALMA), municipalities, provincial governments and other federal departments.
- c) **How?** Draft policies are circulated for review and comment. There is, however, a cutoff date after which comments will not be incorporated into the revised document. Draft policies are usually circulated for a maximum of two rounds of review.

2.3 **Consultation** is a process where stakeholders discuss and give input before a policy is drafted.

- a) **When?** When policies deal with major issues or new policies where the department has some discretion to incorporate stakeholder views.
- b) **Who?** Lands Directorate;  
First Nations and regions;  
Other affected groups such as NALMA, municipalities, provincial governments and other federal departments.
- c) **How?** At the discretion of the policy advisor (meetings, workshops, conference calls, etc.).

- 2.4 **All new policies must be approved** by the Assistant Deputy Minister, Lands and Trust Services. Policies that involve other departments or which are particularly important may require approval by the National Policy Committee (see following paragraphs) and the Deputy Minister. Revisions and rewrites are approved by the Director, Lands Directorate.

### **3. Policy**

- 3.1 The "National Policy Committee" coordinates all phases of policy development. The committee's mandate is limited to issues related to this manual.
- 3.2 The committee consists of:
- a) Manager, Land Planning (chair);
  - b) Manager, Land Management;
  - c) Regional Land Managers.
- 3.3 Members get input from their groups and communicate that input to the committee.
- 3.4 Working groups or subcommittees are sometimes formed to study specific issues. These groups are generally chaired by Headquarters policy advisors and may involve technical experts.

### **4. The Policy Development Process: How it works**

- 4.1 The policy development process involves six phases:
- a) Policy planning
  - b) Research
  - c) Consultation (where required)
  - d) Development
  - e) Review/Revision
  - f) Approval

4.2 The process runs through an annual cycle:

- a) **Draft Policy Plan:** The Land Planning and Land Management Units create, based on committees and user input, a draft plan for new policy and directives. The plan will identify proposed projects and deadlines.
- b) **Consultation on the Policy Plan:** Committee members discuss the draft plan with their respective groups. The committee meets to discuss the plan and make recommendations on the proposed subjects, activities and priorities. The plan is revised as required.
- c) **Policy Research and Consultation:** Policy advisors, and possibly working groups and subcommittees research issues and confer with Legal Services as required. Consultation involves surveys, workshops, focus groups and the acceptance of submissions. Policy is drafted based on the revised policy plan, research and consultation.
- d) **Review:** Committee members review draft policies with their groups, and forward comments to the chairperson. If necessary, the committee meets to discuss policy. Policies are submitted for translation.
- e) **Approval:** Policies are finalized and submitted for approval. Section 2.4 explains who must approve policy.

4.3 Annex A provides a detailed explanation of a policy development cycle.

## 5. Implementation

5.1 You can contact the Land Planning Unit at Headquarters if you have questions about the policy development process.

**Land Planning Unit:**

(819) 953-7916 (phone)

(819) 994-1667 (fax)

## 6. References

6.1 Refer to these manuals for further information:

- a) **The Indian Lands Registration Manual** explains the Indian Lands Registry and tells you how to register documents. For copies contact the Deputy Registrar, Lands Directorate, at (819) 994-6717.
- b) **The Indian Estates Manual** tells you how to deal with reserve lands after an individual First Nations member has died. Copies can be obtained from the Indian Moneys and Estates Directorate in Hull, or from the offices of the Directorate's regional counterparts.
- c) **The Real Property Volume of the Treasury Board Manual** explains the *Federal Real Property and Federal Immovables Act*. You should use it when lands are being purchased, expropriated, exchanged, sold, added to reserves, transferred under section 35 of the *Indian Act*, or where a section 35 right-of-way is granted. A subscription may be purchased from the Canada Communication Group - Publishing, at (819) 956-4802 (phone) or (819) 994-1498 (fax).
- d) **The Natural Resources Policy Manual** tells you how to deal with natural resources such as oil, gas and timber on reserve lands.



**Chapter 1: Introduction**

**Directive 1-2: Policy Development**

**Annex A: Policy Development Process**



## Policy Development Process

### Directive 1-2: Annex A

#### The Land Planning Unit will:

1. Prepare and send to the committee, NALMA and to 53/60 First Nations a **Draft Policy Plan** listing policy bulletins and directives to be developed and providing the following information on each planned project or task:
  - a) A description of the project or task
  - b) A designation of the project or task as high, medium or low priority
  - c) A schedule showing the planned months of review by the committee and the sector executive
  - d) An estimate of the resources required to complete the project or task

#### Committee Members will:

2. Coordinate review of the proposed plan with regional, district, NALMA and First Nation staff and get input on:
  - a) Other issues to be addressed in addition to or in place of those identified in the plan
  - b) Which projects or tasks would benefit from prior consultation and formation of a workgroup
  - c) Their interest in and views on the issues to be addressed through the plan
3. Summarize and submit their comments to the chair and indicate if they would like to discuss the plan.

#### Land Planning will:

4. Review and analyze input from committee members.
5. If necessary, amend the draft plan or prepare responses to the input received.
6. Forward the revised plan and responses to committee members.



7. If necessary, call a teleconference or meeting to review the draft and set up workgroups, and send:
  - a) A summary of input received, and responses to that input
  - b) Statements of issues, objectives, key questions and considerations for each session
  - c) Agenda and background documents
  - d) A revised draft of the policy plan

**National Policy Committee will:**

8. Review and discuss the issues included on the agenda.
9. Submit conclusions and recommendations for consideration by policy and the sector executive.

**Land Planning will:**

10. Prepare a final plan and distribute it to committee members.
11. If necessary, request committee members to nominate representatives to subcommittees
12. Develops, with workgroups, project plans for each project and identifies consultation activities such as:
  - a) Workshops, conferences and meetings
  - b) Surveys and questionnaires
  - c) Submissions from First Nations and their representatives
  - d) Interviews and discussions
13. Implements project plans and develops working documents such as:
  - a) **Background Papers:** Outlining basic information and issues as a basis for consultation
  - b) **Discussion Papers:** Suggesting findings, conclusions, recommendations and proposals for discussion
  - c) **Project Reports:** Stating conclusions and recommendations
  - d) **Draft Directives:** Stating proposed policies and procedures
  - e) **Draft Training Materials and Work Instruments:** Including presentations, forms and instructions.

14. Circulates working papers to committee members, NALMA and 53/60 First Nations for comment and review.

**Committee Members will:**

15. Coordinate the review of working papers by regions, districts, NALMA and First Nations.
16. Consolidate and submit input to Land Planning within deadlines including requests for further consultation or meetings.

**Land Planning will:**

17. Review and analyze input from committee members.
18. If necessary, develop revisions and responses based on member input.
19. If necessary, call a meeting or teleconference to discuss input and send to members:
  - a) A summary of input received, and responses to input
  - b) Statements of issues, objectives, key questions and considerations for each session
  - c) Agenda and background documents
  - d) Revised drafts of the working documents

**National Policy Committee will:**

20. Review and discuss the issues included on the agenda.
21. Submit conclusions and recommendations for consideration by Land Planning and the sector executive.

**Land Planning will:**

22. If necessary, revise working papers and develop responses to recommendations.
23. If necessary, send revised working papers and responses to members.

**Committee Members will:**

24. Coordinate the review of revised working papers by regions, districts, NALMA and First Nations.
25. Consolidate and submit input to the Land Planning Unit within deadlines.

**Land Planning will:**

26. Review and analyze member input.
27. Prepare policy documents such as:
  - a) Directives
  - b) Training materials
  - c) Work instruments, such as forms, instructions and guides
28. Submit policy documents to the Lands and Trust Services Executive Committee for review.
29. Prepare final policy documents based on the sector executive review and submit them to the Assistant Deputy Minister, Lands and Trust Services, for approval.
30. Arrange for distribution of approved policy documents through regions and NALMA.

**Policy Advisor will:**

31. Review approved policy development plan.
32. Select and contact a project team if appropriate.
33. Develop project plan:
  - a) State objective
  - b) Describe project
  - c) Describe proposed output
  - d) State performance expectations
  - e) Estimate time frames
  - f) Estimate costs
  - g) Describe the responsibility / reporting structure

34. Submits project plan to manager for approval.
35. Researches issue(s):
  - a) Identify sources of information
  - b) Obtain, review and analyze information
36. Obtains legal opinion:
  - a) Draft request for opinion
  - b) Include all relevant policy background
  - c) Include all relevant factual background
  - d) Include example(s) if necessary
37. Reviews legal opinion.
38. If consultation is required, identifies:
  - a) Stakeholders to be consulted
  - b) Purpose or objective of consultation
  - c) Methods of consultation
39. If consultation is required, develops consultation procedures.

Options include:

  - a) Surveys
  - b) Workshops/focus groups
  - c) Meetings and interviews
  - d) Requests for submissions
40. If consultation is required, drafts a background paper which identifies the facts and issues but makes no recommendations.
41. Develops policy option(s) which:
  - a) Reflect the results of the consultation process, if consultation was required
  - b) Meet the expectations of the project plan
  - c) Are efficient, effective and realistic
42. Develops decision-making criteria to assess options and determine which option(s) to recommend by preparing a working paper, which includes options and recommendations, for submission to decision-maker.

43. Submits the policy options and recommendations to the decision-maker (usually the Assistant Deputy Minister, senior departmental management, or a departmental committee).
44. Where a policy option(s) is chosen by the decision-maker, revises working paper if necessary.
45. Coordinates the review of revised working papers by regions, districts, NALMA and First Nations.
46. Reviews and analyzes input from regions, districts, NALMA and First Nations.
47. Prepares policy documents such as:
  - a) Directives
  - b) Training materials
  - c) Work instruments, such as forms, instructions and guides
48. Submits policy documents to the Lands and Trust Services Executive Committee for review.
49. Prepares final policy documents based on the sector executive review, and submits them to the Assistant Deputy Minister, Lands and Trusts Services, for approval.
50. Prepares or amends training materials, or works with the Staffing and Training Directorate to ensure that the materials are updated.
51. Arranges for distribution of approved policy documents to the regions and NALMA.

## INDEX TO CHAPTER 2

### CHOOSING THE RIGHT TRANSACTION: AUTHORITIES AND CONDITIONS

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## 1. Purpose

- 1.1 This directive provides general information on reserve lands. Read this directive for information about what reserve land is and what makes it unique.

## 2. General

- 2.1 The Constitution creates a distinction between Indian reserve lands and other lands in Canada. Section 91(24) states that only the federal government can pass laws about "Indians and lands reserved for Indians."
- 2.2 The legal framework underlying reserves is that:
- a) The underlying legal title to reserves belongs to the federal or provincial Crown, depending on various factors such as the province in which a reserve is found, and how the reserve was created;
  - b) Pursuant to s. 2 of the *Indian Act*, reserves are set aside by the Crown in Right of Canada for the use and benefit of a First Nation;
  - c) Generally, only First Nations and their members occupy and use reserve land. However, pursuant to the *Indian Act*, a First Nation may ask the Crown to grant interests, such as leases or other rights, to non-members.
- 2.3 Reserve lands have **unique qualities**:
- a) **All transactions** involving reserve land must be approved by the Minister or the Governor in Council.
  - b) **Reserve lands cannot be seized** by legal process (s.29 of the *Indian Act*).
  - c) **Reserve lands cannot be mortgaged, pledged, or charged to a non-Indian** (s.89 of the *Indian Act*). However, leasehold interests on reserve lands may be mortgaged.
  - d) **Taxation of reserve lands is restricted.** First Nation interests in reserve or surrendered lands cannot be taxed unless held under a lease or permit (s.87 of the *Indian Act*).



- 2.4 There are **two types of First Nation interests** in reserve lands:
- a) **Collective First Nation interest:** A First Nation as a whole has the beneficial interest in its reserve. This interest can best be described as a collective legal right to occupy, use and benefit from reserve land. This interest generally cannot be alienated except by following strict statutory provisions;
  - b) **Interest of individual First Nation members:** An interest pursuant to the *Indian Act* may be granted to an individual band member to get the right to use and occupy parcels of reserve land by an allotment from their council, with ministerial approval. Under the *Indian Act*, members who receive allotments have "lawful possession." Members receiving allotments are called "locatees." Locatees may alienate their land without a surrender or designation under a locatee lease (discussed in Directive 02-02, section 3.16). Some First Nations recognize traditional or custom holdings by individuals, but these holdings are not sanctioned by the *Indian Act* and are not administered by the department.
- 2.5 **The department's role is to carry out and apply the *Indian Act*.** The transaction sections of the *Indian Act* used for reserve land management are sections 18-28 and 54-59 ("reserves," "possession of reserves"), sections 35-41 ("lands taken for public purposes," "surrenders and designations"), section 49 and 50 ("devises entitlement", "devise to a non-resident") and sections 53 and 60 ("management of reserves and surrendered and designated lands").
- 2.6 **Land management powers can be delegated to First Nations.** Section 53 and section 60 of the *Indian Act* allow delegation of certain transactions normally done by the department to First Nations. First Nations with delegated authority act on behalf of the Minister. They are subject to all legislation, regulations and departmental policies.

### 3. Authorities

- 3.1 **Under section 91 of the *Constitution Act, 1867* (U.K.) 30 and 31 Vict. c.3:**

*....the exclusive Legislative Authority of the Parliament of Canada extends to all Matters coming within the Classes of Subjects next hereinafter enumerated: ...*

*(24) Indians and Lands reserved for Indians*

## 4. Policy

- 4.1 **All transactions dealing with reserve land must be authorized by the *Indian Act*.** Pursuant to s. 28(1) of the *Indian Act*, transactions without statutory authority are **void or of no effect** and therefore unenforceable. The creation or expansion of a reserve is not a transaction under the *Indian Act*. Creations and additions are done under the Crown's Royal Prerogative.
- 4.2 **First Nations decide how to use reserve lands.** Although the Crown has title to reserve lands, the department seeks First Nation consent for all transactions.

## 5. Process/Implementation

- 5.1 There are different statutory and policy-based procedures for each type of transaction. You must follow the required procedures correctly to ensure the transaction is valid. Other chapters and directives in this manual will give you specific instructions.

## 6. References

- a) Directive 2-2 outlines which transactions are possible and will help you to choose between them. Directives 2-4, 2-5 and 2-6 examine three topics which affect all transactions: fiduciary obligations, environmental considerations and collective versus individual interests.
- b) Chapters 3 to 10 explain transactions in greater detail.
- c) Chapter 11 discusses the devolution of reserve land management to First Nations, and
- d) Chapter 12 explains the process to be followed under the *Canadian Environmental Assessment Act (CEAA)*.

## 1. Purpose

- 1.1 This directive outlines the authorized transactions affecting reserve land. It will also help you to choose the appropriate transaction for your purpose.

## 2. General

- 2.1 **An interest in reserve land** is a legal right to occupy, use or otherwise benefit from reserve land. A lessee, for example, has a "leasehold" interest. The *Indian Act* creates different types of interests in reserve lands. These are discussed below.
- 2.2 **A transaction affecting reserve land** is an act which creates, changes, transfers or terminates an interest in reserve land. It may be:
- a) **Internal:** involving only the First Nation and its members; or
  - b) **External:** involving the First Nation and/or its members and third parties.
- 2.3 Transactions affecting reserve land require the **approval** of **one or more** of the following:
- a) an individual First Nation member;
  - b) a First Nation council;
  - c) the First Nation membership;
  - d) the Minister;
  - e) the Governor in Council.
- 2.4 The federal Crown has a role in transactions under the *Indian Act*. This means, for example, that the Minister or Governor in Council must approve all transactions and the Minister must execute all leases and permits on reserve lands.

### 3. Policy

- 3.1 **Land officers must follow specific procedures**, such as obtaining First Nation consent and Governor in Council approvals, for each type of transaction. Requirements and instructions for specific transactions can be found in Chapters 3 through 10.
- 3.2 **Proper documentation must be used.** Forms are readily available from the Lands Document System, regional lands managers or headquarters.
- 3.3 **Transactions must comply with all applicable laws.** In addition to the *Indian Act*, statutes such as the *Canadian Environmental Assessment Act (CEAA)*, the *Canadian Environmental Protection Act (CEPA)*, the *Fisheries Act*, and the *Federal Real Property Act (FRPA)* may affect a transaction. Court decisions are another source of applicable law, including the law on the Crown's fiduciary obligations toward Aboriginal peoples (see Directive 2-4).
- 3.4 **Transactions must comply with policy.** All relevant policy relating to reserve land management is contained in this manual.
- 3.5 Transactions that are **unauthorized**, or that **fail to comply** with appropriate laws and policies and proper procedures, may be **void or of no effect**. If you do not comply with the laws, policies and procedures, the transaction may be subject to litigation.
- 3.6 Sections 3.7 through 3.19 describe thirteen of the most common transactions. **Except for additions to reserves**, these transactions are all **authorized** by the Indian Act:
- 3.7 **Additions to Reserves**
- a) **Interest:** The First Nation holds a collective interest in lands added to the reserve.
  - b) **Authority:** The Indian Act does not provide for the creation or expansion of reserves. The Crown's Royal Prerogative is the authority under which the Governor in Council grants reserve status to federally owned land.
  - c) **Appropriate Uses:** Creating new reserves or adding land to reserves under Treaty Land Entitlement agreements, land claim settlements, court orders or self-government agreements are examples of this transaction.

The Crown may add land to reserves for other reasons, such as social needs, geographic purposes, and providing for landless First Nations.

- d) **Process:** An order in council sets the land aside for the use and benefit of a particular First Nation.
- e) **Documents:** An Order in Council and FRPA documentation are required.
- f) **Reference:** Chapter 10

### 3.8 Creation of Individual Interest (Lawful Possession & Allotment)

- a) **Interest:** Individual interests in reserve land are created when a parcel or block of land is "allotted" by a First Nation council. Allotments can only be made to members of that First Nation. The person receiving the allotment is called the "locatee". The locatee receives an interest known as "lawful possession".
- b) **Authority:** Section 20
- c) **Process:** Allotments require a formal First Nation Council Resolution (BCR) and the approval of the Minister.

Allotted lands may be held by one or more locatees (under a joint or common possession arrangement).

Subject to certain restrictions, lawful possession may be transferred or leased.

- d) **Documents:** The locatee's interest is evidenced by a Certificate of Possession, which is issued to the locatee by the department. A BCR must also be issued.
- e) **Reference:** Chapter 3

### 3.9 Transfers of Lawful Possession

- a) **Interest:** Lawful possession (allotments) may be transferred under a sale or other arrangement back to the First Nation or to other members of the First Nation. It cannot be transferred to non-members. The reserve status of the land is maintained.
- b) **Authority:** Section 24
- c) **Appropriate Uses:** Sale of lawful possession from one member to another member; reversion of a member's interest back to the First Nation.

- d) **Inappropriate Uses:** Transfer of any interest in the land to a non-member (i.e. to a utility company).
- e) **Process:** Transfers do not need First Nation council consent, but ministerial approval is required.
- f) **Documents:** Transfer Form, approved by the Minister, and Certificate of Possession
- g) **Reference:** Chapter 3

### 3.10 Transfers of Lawful Possession Under a Will or Intestacy

- a) **Interest:** When a locatee dies, his or her lawful possession must be transferred to the heirs by an administrative transfer. If the heir(s) is a member, the lawful possession is transferred to that member. If the heir(s) is not a member, the interest must be sold to a member or to the First Nation, and the proceeds given to the non-member heir(s).
- b) **Authority:** Sections 42 - 50
- c) **Appropriate Uses:** Transfer of lawful possession upon the death of the locatee.
- d) **Inappropriate Uses:** Any other purpose
- e) **Process:** Under section 49, the Minister must approve a transfer of lawful possession under a will or intestacy (death without a will).

Refer estate matters to the appropriate departmental or First Nation estates officer.

- f) **Documents:** The required documents are the Administrator's or Executor's Transfer, which is approved by the Minister, the Certificate of Possession, and the approved will pursuant to section 45 or appointment of administrator. In the event that the Minister does not have jurisdiction over the estate of the locatee, the provincial proof of probate is required in support of the administrator's transfer.
- g) **Reference:** Indian Estates Manual

### 3.11 Reversion of Lawful Possession

- a) **Interest:** A locatee may cease to be entitled to reside on the reserve, in which case his or her interest must be transferred to another member or to the First Nation within six months. If the interest is not transferred within the time limit, it will automatically revert to the First Nation. The Minister may grant an extension of the six-month time limitation through a ministerial Order.
- b) **Authority:** Section 25
- c) **Appropriate Uses:** When a member transfers his or her membership to another First Nation.
- d) **Inappropriate Uses:** Any transfer where the membership of the locatee is not terminated.
- e) **Process:** The locatee must transfer his or her interest within six months of the loss of membership, unless the Minister extends the time limitation. The Minister must approve the transfer. The First Nation must compensate the locatee for any improvements to the property.
- f) **Documents:** Transfer Form, approved by the Minister, Certificate of Possession, and ministerial Order if time limitation is extended.
- g) **Reference:** Chapter 3

### 3.12 Cancellation of Lawful Possession

- a) **Interest:** Lawful possession may be cancelled when a Certificate of Possession, Certificate of Occupation, or Location Ticket has been issued through fraud or in error.
- b) **Authority:** Section 27
- c) **Appropriate Uses:** Issuance of a Certificate of Possession naming the wrong member or the wrong parcel of land, due to error or fraud.
- d) **Inappropriate Uses:** Cancellation of a Certificate where there is no evidence of error or fraud.

- e) **Process:** The certificate or ticket may be cancelled by the Minister without the consent of the locatee or the holder of the ticket. In most cases, lawful possession will only be cancelled after consultation with the Department of Justice, and, where appropriate, with the First Nation council and the holder or locatee.

An amended First Nation council resolution (BCR) should be obtained where warranted by the situation.

- f) **Documents:** Obtain an amended BCR, if warranted and a Ministerial Order. Issue an amended Certificate of Possession, if necessary.
- g) **Reference:** Chapter 3

### 3.13 Absolute Surrender (Surrender)

- a) **Interest:** The First Nation relinquishes its interest in all or part of a reserve to the Crown. The Crown is then allowed to "sell" or "exchange" reserve land for the benefit of the First Nation. A First Nation may surrender the collective and individual interests in the reserve lands. Surrendered lands lose their reserve status, and the First Nation's interest in the land (both collective and individual) is extinguished.

The First Nation may limit the surrender to timber or to subsurface interests such as minerals.

- b) **Authority:** Sections 37 - 41
- c) **Appropriate Uses:** Surrenders have become rare, since First Nations do not wish to lose their reserve land base. When surrenders occur, they are normally part of a claim settlement or a land exchange.
- d) **Inappropriate Uses:** Lease agreements, right-of-ways.
- e) **Process:** The Crown must deal with the lands according to the expressed instructions of the First Nation. The Act requires the consent of the First Nation membership. The Act requires acceptance by the Governor in Council, who requires a departmental report recommending the acceptance of a surrender.

Locatees, who lose lawful possession, must be compensated.



- f) **Documents:** The surrender document, Order(s) in Council, Agreement of Purchase and Sale (if private land is involved), and FRPA documentation are required.
- g) **Reference:** Chapter 5

### 3.14 Designations

- a) **Interest:** A "designation by way of surrender", known as a "designation", is a process by which the First Nation designates all or part of its land to the Crown. The First Nation may designate the collective and individual interests in the reserve lands. The designation **does not extinguish** the First Nation interest, but it **does extinguish** the individual (locatee) interest. A designation allows the Crown to grant interests in reserve lands on behalf of the First Nation. The reserve status of the land and the First Nation interest are maintained.

Designations are common, since many First Nations wish to develop their land under leases to non-members.

- b) **Authority:** Sections 37 - 41, 53
- c) **Appropriate Uses:** Designations are commonly used where a First Nation wishes to lease reserve land to a non-member. A non-member may, in some cases, be a company owned by a First Nation (i.e. a band corporation).

A First Nation member may lease designated land.

Although leases are the most common type of interest granted under a designation, a designation may also be used to grant a permit, an easement, or a right-of-way.

- d) **Inappropriate Uses:** Sales or exchanges of land to another member must use a section 24 transfer.
- e) **Process:** The Crown must deal with the lands according to the expressed instructions of the First Nation. The Indian Act requires the consent of the First Nation membership and acceptance by the Governor in Council.

Any locatee whose interest is extinguished must be compensated.

- f) **Documents:** The documentation required includes a Designation, and Order in Council, and a lease or other agreement.

- g) **Reference:** Chapter 5

### 3.15 Leasing Unallotted Reserve Lands

- a) **Interest:** A lease grants **an interest in** and **exclusive possession of** reserve lands. It is granted for a specific period of time, often for a long term.
- b) **Authority:** Sections 37 - 41, 53, and section 58(1)(c)
- c) **Appropriate Uses:** A section 53 lease following a designation is used mainly for commercial, residential and recreational developments, and occasionally for agricultural purposes. On rare occasions, a lease for agriculture or grazing purposes under section 58(1)(c) may be used, however, the preferred transaction for such purposes would be a section 28(2) permit.
- d) **Inappropriate Uses:** As mentioned above, where the transaction is for agricultural or grazing purposes, a section 28(2) permit is preferable over a lease. However, a lease under section 53 or 58(1)(c) is available under the Indian Act.
- e) **Process:**
1. The individual who leases the land is called the lessee or tenant. The grantor of the lease is called a lessor or a landlord. The Crown is the lessor for all leases of reserve land.
  2. Unallotted lands can be leased in two ways. The most common is a lease following a designation (ss.37 to 41).
  3. In rare circumstances, a section 58(1)(c) lease of uncultivated reserve lands for the purposes of agriculture or grazing may be used. This type of lease is granted by the Minister without a designation vote, but it does require the consent of the First Nation council.
  4. In all provinces and territories except Quebec, leases may be mortgaged, assigned or sublet, with approval of the Minister. In Quebec, leases grant personal rights only, and cannot be mortgaged. Unless prohibited by the lease or terms of the designation, lessees may mortgage, assign, or sublet their interest, with ministerial approval.

**Leasing Unallotted Reserve Lands (continued)**

- f) **Documents:** A Designation, an Order in Council, and a lease or other agreement are required.
- g) **Reference:** Refer to Chapter 7 for drafting, issuing and cancelling and termination of leases, and to Chapter 8 for the administration of leases, including monitoring the terms and conditions of the lease.

**3.16 Leasing Allotted Lands**

- a) **Interest:** A locatee may lease his or her interest in reserve land without a designation. This is called a "locatee lease". Like all leases, a locatee lease grants an interest in and exclusive possession of the land for a specific period of time.
- b) **Authority:** Sections 58(1)(b), 58(2), and 58(3)
- c) **Appropriate Uses:** Any lease of land by a locatee to another member, the First Nation, or a third party.
- d) **Inappropriate Uses:** Although you could use a lease for agricultural purposes, a section 28(2) permit is the preferred transaction.
- e) **Process:**
  - 1. The courts have ruled that locatee leases do not require First Nation council consent. Under departmental policy First Nation councils must have the opportunity to express their views on all locatee leases prior to ministerial approval.
  - 2. A long-term lease may be seen as conflicting with the designation provisions of the Indian Act. Therefore, a vote of First Nation members is required for all locatee leases of more than 49 years.
  - 3. Although not commonly used, a locatee lease under section 58(1)(b) for the purposes of agriculture or grazing is used where allotted land is uncultivated or unused. Although this type of lease is available under the Indian Act, the preferred transaction would be a permit under section 28(2).
  - 4. A s.58(1)(b) lease does not require a designation vote, but the First Nation council must consent to the lease.

**Leasing Allotted Lands(continued)**

5. In all provinces and territories except Quebec, locatee leases may be mortgaged, assigned or sublet, with approval of the Minister. In Quebec, leases grant personal rights only, and cannot be mortgaged.
- f) **Documents:** A locatee lease, locatee approval of the terms of lease, and CEAA Screening is required. Additional information where appropriate: Certificate of Independent Legal Advise.
- g) **Reference:** Refer to Chapter 7 for drafting, issuing and cancelling and termination of leases, and to Chapter 8 for the administration of leases, including monitoring the terms and conditions of the lease.

**3.17 Permits**

- a) **Interest:** Permits allow non-members to use reserve lands in a limited way for a specific period of time. Unlike leases, they do not grant an interest in land and are generally short-term.
- b) **Authority:** Sections 28(2) and 58(4)
- c) **Appropriate Uses:**
  1. Use a s.58(4) permit for the removal of clay, sand, gravel, other non-metals, wild grass or fallen timber.
  2. Use a s.28(2) permit for all other types of permits such as access, utility services to the reserve, and grazing or agricultural purposes where exclusive use is not required (i.e. distribution). Use s.28(2) permits for utility rights of way only where the primary purpose is to **service** the reserve (i.e. distribution).
- d) **Inappropriate Uses:**
  1. Do not use a permit when exclusive use is contemplated. Crop farms requiring exclusive use (such as those which involve farm buildings), parking lots and airports are examples of inappropriate uses. In these cases, the preferable procedure would be a designation and lease.
  2. Do not use s.28(2) where access is merely to **cross** the reserve (i.e. transmission). In these circumstances, use a designation and lease or a s.35 taking (discussed in paragraph 24).

## Permits (continued)

- g) **Process:**
  - 1. The individual who obtains a permit is called the permittee. The grantor of a permit is called the permittor. The Crown is the permittor for all permits granted over reserve land.
  - 2. Under the Indian Act, consent of the First Nation council is required for permits which exceed one year. Departmental policy requires the consent of First Nation council for **all** permits.
- h) **Documents:** A permit, a CEEA Assessment, and BCR consent are required.
- i) **Reference:** Refer to Chapter 6 for drafting, issuing and cancelling and termination of permits, and to Chapter 8 for the administration of leases, including monitoring the terms and conditions of the permit.

### 3.18 Setting Aside Land for the Use and Welfare of the First Nation

- a) **Interest:** Under the Act, the Minister may set aside reserve lands on behalf of the First Nation for "the general welfare of the band". Locatee land may be taken but the locatee must be compensated.
- b) **Authority:** Section 18(2)
- c) **Appropriate Uses:** The proposed use must be primarily for the First Nation. It must benefit the entire community and not just a restricted group within the community. Appropriate uses include community infrastructure projects (roads, sewers, airports), schools, community halls, health offices and burial grounds.
- d) **Inappropriate Uses:** Do not use s.18(2) for commercial or economic development purposes.
- e) **Process:** This transaction is often used with a s.28(2) permit, for example, to allow a nursing station or treatment centre run by Health and Welfare Canada to operate on reserve.

f) **Documents:**

1. Requires a BCR if the land is unallotted or, if the land is in the lawful possession of a First Nation member, a ministerial Order citing that the land is assigned for the use of the First Nation. If the taking of land is controversial, a ministerial Order will be required. A permit under section 28(2) might also be required.
2. When a taking is without the consent of a locatee, compensation should be made under an expropriation method. Consult with Chapter 4.

g) **Reference:** Chapter 04.**3.19 Takings for Public Purposes ("Expropriations")**

- a) **Interest:** The interest taken or transferred may be all the interest in the reserve land or something less than full ownership, such as an easement or right of way. There is a fiduciary duty to ensure that the taken interest is the minimum required to fulfil the public purpose for the taking.
- b) **Authority:** Section 35
- c) **Appropriate Uses:** Use s.35 transactions for public highways, hydro transmission lines, hydro dams, and railway easements.
- d) **Inappropriate Uses:**
  1. Where the party seeking use of reserve land **does not have statutory powers of expropriation, s.35 cannot be used.** Another section of the Act must be used, such as a surrender, a designation or a subsection 28(2) permit.
  2. **Do not use** s.35 where the service or use is for the benefit of the First Nation, such as hydro service lines to First Nation members (i.e. distribution). Section 28(2) permits are more appropriate in those circumstances.

- e) **Process: Under section 35(1)**
1. a province, a municipal or local authority or a corporation with **statutory expropriation powers** may take or use reserve land, with the consent of the Governor in Council. Since the Crown has title to reserves, the process is not technically an expropriation of the interests of the locatee, First Nation, or lessee.
  2. **Under Section 35(3)** the Governor in Council may authorize a transfer or grant of reserve land to a province, a municipal or local authority or a corporation with statutory expropriation powers, where the Governor in Council has **consented** to the taking of the land.
  3. Although not a statutory requirement, policy requires the consent of the First Nation council. The only exception is in exceptional circumstances where the national interest is paramount.

Before using this section, the possibility of a surrender or designation of the land or use of a subsection 28(2) permit should be discussed with the First Nation council, to determine which approach they prefer.

The First Nation and affected locatees must receive compensation including compensation for the loss of reserve status for any land for which a full interest is proposed to be granted or transferred.

- f) **Documents:** The transaction requires an Order in Council and FRPA documentation. The documentation must be clear as to the exact interest being granted by the taking.
- g) **Reference:** Chapter 9

#### 4. **Process: Choosing a Transaction**

- a) It is sometimes difficult to choose between transactions which seem to accomplish similar purposes. The following paragraphs will help you choose the best transaction for your purpose. The factors are listed in order of most to least important:
1. **Choose the most certain authority.**
  2. **Choose the authority which has the least impact on other interests.**

3. **Choose the least complicated procedure.**
- b) **Choose the most certain authority.** Avoid authorities which are controversial or questionable in the circumstances. This will minimize future questions or challenges to the validity of the transaction.

**EXAMPLE 1: CHOOSE THE MOST CERTAIN AUTHORITY**

A company owned by First Nation members will construct a small commercial airport servicing both reserve members and the general public. The airport would benefit the reserve community by improving transportation and enriching the economy. It would, however, disrupt a number of traplines. Two transactions are suggested:

- (a) the lands be taken under s.18(2) as the project is for "the general welfare of the band";
- (b) the lands be designated and leased to the First Nation's company.

Section 18(2) must be used only for projects which are targeted at First Nation members and which are clearly for the welfare of the entire First Nation. In this example, it is uncertain whether these two conditions would be met. The airport is for non-Indians as well as the reserve community, and trappers would be negatively affected.

On the other hand, there is no doubt that a designation and lease would be valid. In this case, **choosing the most certain authority** means choosing a designation and lease.

- c) **Choose the authority which has the least impact on other interests.**

**EXAMPLE 2: CHOOSE THE AUTHORITY WHICH HAS THE LEAST IMPACT ON OTHER INTERESTS**

A local tourist ranch requests a two year right of way over a small strip of reserve lands for a riding trail. The strip of land is unallotted, but is occasionally used by members, with approval of the First Nation council, as a recreational area. The ranch will use the lands only occasionally, on a temporary basis until it can acquire alternate lands.

Two transactions are suggested:

- (a) the lands be designated and leased;
- (b) a permit be issued under s.28(2).

A designation and lease would transfer exclusive possession of the land to the ranch. The First Nation would be completely excluded from using the lands for the duration of the lease. A s.28(2) permit, on the other hand, could merely grant to the ranch a right to occasional use, and would not severely affect the First Nation's use of the property. In this case, **choosing the authority which impacts least on other interests** means choosing a s.28(2) permit.



- d) **Choose the least complicated procedure.** This guideline must be applied with caution, and **only in circumstances where "all other factors are equal"**.

### EXAMPLE 3: CHOOSE THE LEAST COMPLICATED PROCEDURE

A First Nation negotiates an agreement with a neighbouring non-Indian to use a parcel of uncultivated, unallotted reserve land for grazing or agricultural purposes.

Two transactions are suggested:

- (a) the lands be designated and leased;
- (b) a permit be granted without designation pursuant to section 28(2).

A designation will require a fairly complex and time consuming First Nation vote. A s.28(2) permit does not require a vote and is relatively simple to implement. Both options are certain to be valid, and neither impacts seriously on existing rights. In these circumstances, as "other factors are equal", **choose the least complicated procedure** of a s.28(2) permit.

## 5. Process/Implementation

Annex A has tables which will assist you in choosing the most suitable instrument or transaction for your purpose. It summarizes major statutory, policy and legal considerations.

## 6. References

- a) Chapters 3 to 10 describe specific transactions in greater detail.
- b) Chapter 12 which describes the CEAA process.

**Chapter 2: General Information**

**Directive 2-2: Transactions and Choosing Authorities**

**Annex A: Choosing an Authority**



<b>SUMMARY OF TRANSACTIONS</b>
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Purpose	Authority and Documents	Comments	Manual Chapter
Creation or expansion of reserve	Royal Prerogative; order in council & FRPA documentation	Check policy requirements for granting reserve status to land	Chapter 10
Grant lawful possession of First Nation land for indefinite period to First Nation member (Allotment)	s.20; BCR (approved by Minister) & Certificate of Possession	To member only (locatee) Reserve status maintained First Nation council grants the allotment Ministerial approval required	Chapter 3
Transfer of lawful possession	s.24; Transfer Form (approved by Minister) & Certificate of Possession	To First Nation or member only Reserve status maintained First Nation council consent <b>not</b> required Ministerial approval required	Chapter 3
Transfer of lawful possession under a will or intestacy	s.49; s.50; Administrator's or Executor's Transfer (approved by Minister) & Certificate of Possession	To First Nation member only Must be heir Non-member can receive proceeds of sale, but not lawful possession Reserve status maintained First Nation council consent <b>not</b> required Ministerial approval required If land remains unsold, it may revert to the Band	Chapter 3

<p>Reversion of lawful possession</p>	<p>ss.25,24; Transfer Form (approved by Minister) &amp; Certificate of Possession, &amp; Ministerial Order (if extension required)</p>	<p>Check that locatee has ceased to be entitled to reside on reserve Reversion to the First Nation is automatic after 6 months, unless possession is extended under Ministerial Order Use s.24 to transfer interest within 6 months from dis-entitlement Locatee must be compensated</p>	<p>Chapter 3</p>
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Purpose	Authority and Documents	Comments	Manual Chapter
Cancellation of lawful possession due to fraud, error	s.27; Amended BCR, if warranted; amended Certificate of Possession, if necessary	Check that certificate was issued through fraud or in error Minister's consent required Locatee's consent not required Department of Justice usually consulted First Nation council resolution may be necessary	Chapter 3
Sale or exchange of reserve land (surrender)	ss.37-41; Surrender, Order(s) in Council, Agreement of Purchase and Sale (if private land is involved) and FRPA documentation	Reserve status lost First Nation interest extinguished Locatee interest extinguished Locatees compensated First Nation membership and Governor in Council consent required Departmental report required	Chapter 5
Lease or other use of reserve land by third parties (usually long term) (designation)	ss.37-41, s.53; Designation, Order in Council, and Lease or other agreement	Usually grant a leasehold interest but may grant other interest less than full ownership, e.g., easement Reserve status and First Nation interest maintained Locatee interest extinguished Locatees compensated First Nation membership and Governor in Council consent required	Chapter 5
Use of <b>uncultivated</b> land by third parties for grazing	s.28(2); Permit (preferred transaction)  s.58(1)(c); Lease (used rarely)	Designation not required May be unallotted or locatee land Reserve status maintained First Nation council consent required Ministerial approval required	Chapter 6 (Permit)  Chapter 7 (Lease)

Lease of locatee land by third party	s.58(3), s.58(1)(b)(rarely used); Locatee Lease	Designation not required Must be locatee land Locatee consent required First Nation council consent not required Lease for term of more than 49 years requires First Nation consent Ministerial approval required Reserve Status maintained	Chapter 7
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Purpose	Authority and Documents	Comments	Manual Chapter
Short-term, non-exclusive use for utilities which service the reserve	s.28(2); Permit	Do <b>not</b> use when exclusive use is required [consider lease, sale or s.35] Do <b>not</b> use for line <b>crossing</b> reserve [use s.35, lease] Do <b>not</b> use for removal of clay, sand, gravel, other non-metals, wild grass or fallen timber [use 58(4)]	Chapter 6
Short term, non-exclusive use for removal of clay, sand, gravel, other non-metals, wild grass or fallen timber	s.58(4); Permit	Do not use when exclusive use is required [consider lease, sale, s.35]	Chapter 6
Internal taking for general welfare of First Nation	s.18(2); Ministerial Order citing that the land is assigned for the use of the First Nation, & possibly s.28(2) Permit	For the general welfare of the First Nation First Nation use only Must benefit entire reserve community s.28(2) permit is required for service provided by non-Indians, such as nursing station run by Health and Welfare Canada Reserve status maintained Locatees compensated First Nation council consent required Ministerial approval required	Chapter 4



<p>Expropriation, transfer or grant of reserve land for public roads and highways, transmission lines, railway easements, etc. <b>crossing</b> reserve</p>	<p>s.35; Order in Council &amp; FRPA documentation</p>	<p>Authority must have expropriating power Reserve status may be lost If made a condition of the Order in Council, the land returns to reserve status after use First Nation council consent normally required Governor in Council consent required First Nation and locatees compensated <b>Not</b> for utilities <b>which service</b> reserve [use s.28(2) permit]</p>	<p>Chapter 9</p>
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## 1. Purpose

- 1.1 This directive gives you general information about registration requirements for transactions involving reserve lands.

## 2. General

- 2.1 The *Indian Act* requires **two registers** for the purpose of registering transactions affecting reserve lands:
- a) S.21 states that details of all transactions involving reserves lands must be registered in "**the Reserve Land Register**";
  - b) S.55(1) states that details of all transactions involving surrendered or designated lands must be registered in "**the Surrendered and Designated Lands Register**".
- 2.2 Both registers are located in the "**Indian Lands Registry**", at departmental headquarters in Ottawa-Hull (10 Wellington St., OTTAWA, K1A 0H4).
- 2.3 The department **will not register** unauthorized transactions and/or transactions which it does not recognize or administer. Examples include:
- a) custom allotments
  - b) leases or permits granted by a First Nation outside the *Indian Act*
  - c) conditional assignments (prohibited under s.55(2)).
- 2.4 Aside from statutory requirements, the benefits of maintaining a lands registry are:
- a) having a record of transactions and uses of reserve and surrendered lands to allow First Nations and the department to track transactions;

- b) providing a history of transactions and interests granted on a parcel. This will secure and help to protect the legal rights of individuals who have, or may acquire, an interest in land. This is particularly important to First Nations, developers and lenders. This history can also provide a record of past uses, assisting with environmental assessments.

### 3. Authorities

#### 3.1 The *Indian Act* states that:

*21. There shall be kept in the Department a register, to be known as the Reserve Land Register, in which shall be entered particulars relating to Certificates of Possession and Certificates of Occupation and other transactions respecting lands in a reserve.*

*55.(1) There shall be kept in the Department a register, to be known as the Surrendered and Designated Lands Register, in which shall be entered particulars in connection with any transaction affecting absolutely surrendered or designated lands.*

- 3.2 Subsections 55(2) to 55(4) and s.56 of the Indian Act deal with the registration of assignments.

### 4. Policy

- 4.1 **All transaction documents** must be submitted for registration upon execution.
- 4.2 All documents submitted for registration must meet **certain basic requirements**, as set out in the Indian Lands Registration Manual. These requirements include but are not limited to the following:
  - a) An application must accompany the document.
  - b) The document must be an original or certified copy.
  - c) The document must be legible and properly executed.
  - d) The document must clearly identify the parties involved and the interest being created, transferred or extinguished.

**Registration Requirements (continued)**

- e) The lands must be accurately identified by an appropriate legal description or a survey. Specific description requirements vary depending on the transaction.
  - f) Consent of the First Nation council or member and ministerial or Governor in Council approval must be provided where required by the *Indian Act*.
  - g) There must be no conflicting registered interest in the land.
  - h) Generally, a document will not be accepted if there is no road or other access to the land.
- 4.3 Any document which the Indian Lands Registry rejects for registration should be corrected and re-submitted as quickly as possible.

**5. Process/Implementation**

- 5.1 The procedure for registration of interest in land is set out in the Indian Lands Registration Manual and in Chapters 3 to 10 of this manual.

**6. References**

Refer to the Indian Lands Registration Manual for specific registration procedures.

## 1. Purpose

- 1.1 This directive introduces the important concept of the Crown's **fiduciary obligations** towards First Nations people.

## 2. General

- 2.1 There is a **special relationship** between the government of Canada and Aboriginal peoples. This relationship is similar to a trustee-beneficiary relationship.
- 2.2 The special relationship creates **specific fiduciary obligations** which the Crown incurs in certain situations, depending on the nature of the transaction. The government of Canada **does not have** a general fiduciary obligation toward First Nations in **all** situations.
- 2.3 Based on two important cases decided by the Supreme Court of Canada, the Department of Justice has identified **two categories** of fiduciary obligations: "**Guerin-type**" and "**Sparrow-type**".
- 2.4 **Guerin-type** fiduciary obligations arise where the Crown controls assets such as land, natural resources or money on behalf of First Nations. **All three** of the following criteria must be present to **trigger** a fiduciary obligation:
- a) the Crown has an **obligation** to act on behalf of a First Nation, either because of a statutory duty or because of a specific action or decision which triggers the obligation;
  - b) the Crown can exercise a **power or discretion** so as to affect the legal interests of the First Nation; and,
  - c) the First Nation is **vulnerable** to the action or inaction of the Crown. This means it is unable to protect its own interests because of legal incapacity or possibly lack of resources.
- 2.5 Surrenders and designations are examples of **Guerin-type** situations.

- 2.6 **Sparrow-type** fiduciary obligations stem from s.35 of the *Constitution Act*, which protects Aboriginal and treaty rights. Where Aboriginal or treaty rights are potentially affected by government actions, the government has a fiduciary obligation not to unjustifiably interfere with the exercise of these rights.
- 2.7 Examples of **Sparrow-type** situations include an addition to reserve which might affect Aboriginal rights of a competing First Nation, and a s.35 taking of reserve lands previously established under a treaty.
- 2.8 **Guerin-type** obligations occur **frequently** in the course of managing reserve lands. **Sparrow-type** duties, on the other hand, will **rarely** arise in land management.
- 2.9 Guidelines in each chapter of this manual are designed to help you to fulfil the Crown's fiduciary duties. You must therefore manage all transactions in accordance with these guidelines.
- 2.10 The courts have held that "**the honour of the Crown**" is an important factor in all dealings between the government and First Nations. This concept means the government must deal fairly, honestly, openly and intelligently with Aboriginal peoples.

### 3. Authorities

- 3.1 **Under the *Constitution Act*, 1982 R.S.C. 1985, appendix ii, no. 44:**

*35.(1) The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.*

*(2) In this Act, "aboriginal peoples of Canada" includes the Indian, Inuit and Métis peoples of Canada.*

*(3) For greater certainty, in subsection (1) "treaty rights" includes rights that now exist by way of land claims agreements or may be so acquired.*

*(4) Notwithstanding any other provision of this Act, the aboriginal and treaty rights referred to in subsection (1) are guaranteed equally to male and female persons.*

3.2 The leading court decisions concerning the special relationship between the crown and First Nations are:

- a) *Guerin v. The Queen*, [1984] 2 S.C.R. 335.
- b) *Sparrow v. The Queen*, (1990) 46 B.C.L.R. (2d) 1.

## 4. Policy

4.1 Each chapter of this manual provides guidelines for fulfilling the fiduciary obligations arising in the course of managing and administering reserve lands. You must follow and adhere to the guidelines to ensure that the Crown's fiduciary obligations are met.

4.2 **Department employees should seek advice from the Department of Justice** if they are **uncertain** about the existence of a fiduciary obligation or the procedures to discharge the duty.

4.3 **Department employees must seek legal advice from the Department of Justice** if there is a possible conflict of interest between a First Nation and its members, or between the First Nation and the government.

## 5. Process/Implementation

5.1 The guidelines set out in this manual must be followed to ensure that fiduciary obligations are met. However, the process of discharging the Crown's fiduciary obligations is not an exact science and also requires the exercise of individual judgment. Where you wish to **deviate** from guidelines, **consult** with headquarters and/or the Department of Justice **before** making any decisions.

## 6. References

- a) Chapters 3 to 11 contain fiduciary obligation guidelines specific to particular transactions.
- b) A departmental paper entitled "Lands and Environment Fiduciary Management Strategy" is available from Regional Land Managers.

## 1. Purpose

This directive introduces the general environmental requirements which apply to transactions affecting reserve land.

## 2. General

2.1 In this directive the following definitions apply:

- a) **"Environmental assessment"** means an assessment of the environmental effects of a project conducted in accordance with the *Canadian Environmental Assessment Act (CEAA)* and its regulations.
- b) **"Mitigating measures"** means the elimination, reduction, or control of the adverse environmental effects of the project, including restitution for any damage to the environment caused by such effects through replacement, restoration, compensation, or any other means.
- c) **"Proponent"** means the person, body, federal authority, or government that proposes the project.

2.2 **Under the *Canadian Environmental Assessment Act (CEAA)*, an environmental assessment may be required for certain transactions involving reserve lands.** The purpose of environmentally assessing a proposed transaction is to identify potentially adverse impacts on the environment and to find ways to minimize those impacts. If significant impacts cannot be minimized, a project cannot proceed.

2.3 The ***Canadian Environmental Protection Act (CEPA)*** regulates the use and control of toxic substances which cause land, air and water pollution, and requires reporting of releases and emissions under specified circumstances. It also imposes stringent liability and penalties for non-compliance.

2.4 The federal ***Fisheries Act*** regulates the release of deleterious substances into bodies of water frequented by fish.



### 3. Authorities

3.1 Statutory authorities and policy statements include:

- a) *The Canadian Environmental Assessment Act*, S.C 1992, c.37, and its Regulations.
- b) *Canadian Environmental Protection Act*, R.S., c.C-15.3.
- c) *Fisheries Act*, R.S., c.F-14.
- d) Additions to Reserve Policy

### 4. Policy

- 4.1 **All transactions must comply** with applicable federal and provincial environmental laws, regulations and government policies and directives.
- 4.2 **CEAA must be applied in the planning stages** of all transactions.
- 4.3 **The department must ensure that an environmental assessment is completed. The department must ensure that proponents**, usually developers, conduct and pay for the environmental assessment under *CEAA*. The assessment must be submitted to both the department and the First Nation council.
- 4.4 Depending on the policy justification for a proposed addition, **the First Nation, the vendor or the department** will conduct and/or pay for the costs associated with environmental reviews of proposed additions.
- 4.5 Final decisions about if and how transactions may proceed **cannot be delegated** to non-departmental proponents.

## 5. Process / Implementation

- 5.1 Chapter 12 of this manual describes the specific environmental obligations for each transaction.
- 5.2 **The general procedure** under *CEAA*, when an environmental assessment is required, is:
- a) The environmental assessment must be carried out as early in the planning process as possible, before irrevocable decisions are made.
  - b) Where there is a **third party proponent**, or where the First Nation council is the proponent, the proponent must, at the request of the department, provide an environmental assessment to both the department and the First Nation which includes the environmental impacts of its project and the proposed mitigating measures.
  - c) Where **the department is the proponent**, it conducts or arranges for an environmental assessment and **must provide** the First Nation with the results. The department must make its environmental assessment decision before the land transaction can be approved;
  - d) The department **consults** the First Nation on whether the proposed transaction should be approved, and then **decides** whether the transaction will proceed and if so, on what basis;
  - e) Where a **First Nation has delegated authority** to approve a transaction (under sections 53 and 60 of the *Indian Act*), it assumes what would otherwise be the department's responsibilities. It must ensure that an environmental assessment is done and decide if and how a proposed transaction will proceed.

- 5.3 **The general procedure under the *Additions to Reserve Policy* is:**
- a) The department obtains **information** on past and present land use;
  - b) The department conducts a **preliminary visit** to the site;
  - c) The department conducts **searches** of public records and government authorities;
  - d) Where required, the department ensures that a **comprehensive site investigation** is done;
  - e) Where required, the department ensures that the land to be added to reserve is **cleaned-up**.
- 5.4 Contact the Environment and Natural Resources Directorate for procedures related to **compliance** with ***CEPA*** and the ***Fisheries Act***.
- 5.5 **You should seek advice** from Environment and Natural Resources or Lands staff and/or the Department of Justice (if you are a departmental employee) to answer any questions about the department's environmental protection responsibilities.

## 6. References

Specific environmental policy and procedures can be found in Chapter 12 of this manual.

## 1. Purpose

This directive discusses the collective interest of a First Nation and the individual interest of a locatee in reserve land. It provides general guidelines to help resolve situations where these two interests may conflict.

## 2. General

- 2.1 The Crown holds legal title to reserves specifically "for the use and benefit" of a First Nation. This creates the **beneficial interest** of a First Nation in a reserve. This beneficial interest is held by the First Nation **as a whole**.
- 2.2. The First Nation council may **grant a share of the collective beneficial interest** to an individual called a locatee. A **locatee** holds reserve land in **lawful possession**.
- 2.3 A First Nation and a locatee may transfer, lease, or otherwise deal with their interests under the *Indian Act*, subject to the necessary approvals. Transactions involving the First Nation's interest often **affect** the locatee interest. Occasionally, a transaction involving a locatee interest may **impact** upon the collective First Nation's interest. This may create a **conflict** between a First Nation and a locatee.
- 2.4 A transaction may also affect the Crown's **fiduciary duty**. For example, when managing and administering a s.58(3) locatee lease, where the First Nation takes an action which diminishes the locatee's interest, the Crown's **primary** obligation is to the locatee.
- 2.5 You will not find a section of the *Indian Act* dealing specifically with conflict. If the *Indian Act* permits a transaction, and the Crown and the First Nation as a whole or the locatee follow appropriate procedures, the transaction will be **valid** regardless of a possible conflict.
- 2.6 A lands officer or manager may be asked to help **resolve** conflicts.

### 3. Authorities

3.1 These sections of the *Indian Act* specifically refer to the **collective interest** of a First Nation in reserve land:

s. 2; ss17(2); ss18(1); ss 18(2); s 25; ss28(2); ss35(4); s.36-38;  
ss58(1)(a), ss58(1)(c), ss58(2) and ss 58(4).

3.2 a) These sections specifically refer to the **individual interest** of a locatee in reserve land:

ss18(2); s.20; s. 22-25; ss35(4); s.38; ss50(1); ss58(1)(b); ss58(3).

2. Since the above sections **interact**, you must read the relevant sections together.

### 4. Policy

4.1 Although the *Indian Act* is silent on conflicts between a First Nation as a whole and individual First Nation members, the department **will address conflicts** as they arise.

4.2 In addressing conflicts, the department **must ensure** that it meets its **fiduciary obligations** to both First Nations and individual members.

4.3 **Examples of potential conflicts are:**

- a) Locatee objections to a surrender or designation;
- b) Locatee objections to a s.18(2) taking "for the general welfare of the band";
- c) Locatee objections to a s.35 "expropriation";
- d) First Nation objections to a transfer of an allotment by a locatee;
- e) First Nation objections to a locatee lease.

- 4.4 **Compensation** must be paid where locatee interests are **extinguished or diminished**. The Act generally requires compensation, but when it is silent, fair compensation will be paid as a matter of policy. Individual manual chapters discuss this requirement where applicable.
- 4.5 Compensation is a matter for **negotiation** between locatees and First Nation councils. You can assist by providing information in the department's possession and encouraging the parties to reach an agreement. Information you provide must be accurate and timely.
- 4.6 The parties may be unable to reach an agreement. The Minister can **impose** an amount of compensation to be paid by the First Nation or the person who goes into the possession of the lands under certain sections of the *Indian Act* (ss.18(2), s 23, and ss' 25(2), 50(3)). These situations and **specific requirements** are discussed in the individual transaction chapters.
- 4.7 There may also be questions about whether the Crown owes a **fiduciary obligation to the First Nation or the locatee** in a particular case. **Legal advice** should be obtained in these circumstances. Departmental employees must seek advice from the Department of Justice.

## 5. References

You can find specific policy and procedures in Chapters 3 through 12. Refer also to Directive 2-4 for information on the department's fiduciary obligations.

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# Directive 3-1

## Overview

### 1. Purpose

To provide general information about the contents of this chapter, as this relates to individual band member interests in reserve lands.

### 2. General

This directive provides information on creating, transferring and cancelling individual band member interests and related transactions.

### 3. Definitions

- a) **Allotment** – the process by which an individual First Nation member receives lawful possession of reserve land from the First Nation council under section 20 of the *Indian Act*;
- b) **Band Council Resolution (BCR)** – a document which contains a resolution made by a First Nation council at a duly convened First Nation council meeting which has been discussed, voted on, and passed by a quorum of council. See “*Indian Band Council Procedure Regulations*” for the order and proceedings of a meeting.
- c) **Certificate of Occupation** – the documentary evidence, issued under subsection 20(5) of the *Indian Act*, of a First Nation member's right to temporary use and occupation of reserve lands pursuant to the provisions of subsections 20(4) and (6);
- d) **Certificate of Possession (CP)** – documentary evidence of a First Nation member's lawful possession of reserve lands pursuant to the provisions of subsections 20(2), (3) or sections 22, 24 or 49 of the *Indian Act*;
- e) **Locatee** – the individual First Nation member who holds lawful possession of a duly allotted parcel of reserve lands. A locatee must be a registered member of the First Nation making the allotment or entitled to be registered under the *Indian Act*;

**Définitions (continued)**

- f) **Location Ticket** – a document issued under the *Indian Act, 1880* or any statute relating to the same subject matter, which is evidence of a person's lawful possession of reserve lands, and is synonymous with CPAs defined in the *Indian Act*;
- g) **No Evidence of Title Issued (NETI)** – that for any of a variety of reasons, no title was issued even though the lawful possession has been approved by the Minister;
- h) **Transfer** – the process which allows a locatee to give his or her lawful possession of reserve land to another member of the First Nation, or back to the First Nation, under section 24 of the *Indian Act*.

**4. Authorities**

- 4.1 Departmental policy is governed by sections 20 to 28, and section 49 of the *Indian Act*.
- 4.2 In addition, section 60 of the *Indian Act* is relevant in that it permits the Governor in Council to grant to the First Nation control and management over its lands. First Nations with section 60 authority can approve allotments and transfers on behalf of the Minister.

**5. Policy**

- 5.1 The department's primary objective is to respect and carry out decisions made by the First Nation and its members concerning the creation and transfer of possessory rights on reserve land. However, individual interests in reserve land will only be created, transferred or cancelled where the relevant policy requirements are satisfied. Each directive includes separate policies for each of these requirements and other related transactions.

**6. Process**

- 6.1 Different statutory and policy-based procedures exist for each type of transaction. Lands Officers should follow the required procedures as set out hereafter.

## 7. Implementation

This directive replaces previous policy directives dealing with this subject matter and will come into force upon distribution.

## 8. References

8.1 For more information you should read:

- a) *Indian Lands Registration Manual*
- b) *Estates Procedures Manual*, September 14, 1994
- c) *Lands and Environment Fiduciary Management Strategy*, January 12, 1994

## Directive 3-2

### Creating Individual Interests

#### 1. Purpose

- 1.1 This directive explains how to create individual band member interests in reserve land and what evidence of possession INAC provides, where possession of the land has been allotted by a First Nation council pursuant to subsection 20(1) of the *Indian Act*.
- 1.2 This directive explains how the historical practices of Cardex Holdings and Notices of Entitlement created individual band member interests in reserve land.
- 1.3 This directive also explains how, pursuant to section 22 of the *Indian Act*, individual interests may be created where a First Nation member in possession of lands has made permanent improvements thereon and the lands are subsequently added to a reserve.

#### 2. General

- 2.1 Although reserve lands are for the use and benefit of the First Nation as a whole, individual members may acquire the right to use and occupy parcels of reserve land. A First Nation council may allot possession of the land to a member of that First Nation, subject to the approval of the Minister. According to the provisions of subsection 20(1) of the *Indian Act*, members who receive such an allotment have lawful possession of land in a reserve.
- 2.2 It is the right to possession which the locatee can transfer under section 24 and which may pass by devise or descent under sections 48 and 49 of the *Indian Act*. Legal title to the land in question always remains vested in Her Majesty in right of Canada.
- 2.3 The actual creation of an allotment is made by way of a BCR, which is then submitted for Ministerial approval. An approved allotment is subsequently registered in the Indian Lands Registry (ILR) and the ILR issues a CP as evidence of lawful possession.

## General (continued)

- 2.4 a) **Cardex Holdings.** A Cardex Holding is a historical individual interest in reserve land. These holdings were created by BCR and approved by the Minister under section 20(1) of the *Indian Act*. The land descriptions associated with Cardex Holdings were vague and often inaccurate. While most of the interests known as Cardex Holdings are registered in the Indian Land Registry, a proper survey must be done before any further transactions can take place on the particular parcel of land. Generally speaking, holdings defined as Cardexes, Notice of Entitlement (NE) or No Evidence of Title Issued (NETIs) (see Directive 3-4 clauses 5.13 and 5.14) are simply unsurveyed allotments for which a CP has not been issued by the Indian Lands Registry as documentary evidence of the lawful possession.
- b) The only significant difference between a Cardex, NE, or NETI and a CP is that the CP is usually surveyed and these other holdings are usually not surveyed.
- 2.5 **Notices of Entitlement (NE).** An interest held under a Notice of Entitlement is similar to a Cardex Holding, in that the holdings were created by an allotment by the First Nation council and approved by the Minister under subsection 20(1) of the *Indian Act*. The interest of the holder of a Notice of Entitlement is recognized as lawful possession under the *Indian Act*.
- 2.6 By virtue of section 22 of the *Indian Act*, lawful possession may also arise where a First Nation member was in possession of lands at the time that the lands were included in the reserve, and he or she had made permanent improvements on that land. Generally, the lands in question would be those which, prior to their addition to a reserve, were held by a First Nation member under the laws of the province where the lands are situated. The expectation is that First Nation members will rarely claim interests under this section of the Act.
- 2.7 Certain First Nations do not subscribe to the allotment provisions of the *Indian Act*. Instead, these First Nations recognize traditional or custom holdings by individuals and grant "occupational rights at the pleasure of the First Nation council." The department does not administer these interests, which are not lawful possession under the *Indian Act*, and therefore, these holdings are not registered in the ILR. The holders of these interests have no legal rights and remain on the property at the pleasure of the First Nation council.

### 3. Authorities

#### 3.1 Relevant statutory authorities include:

*Indian Act*, ss. 20(1) - ss. 20(3), & s. 22

20. (1) *No Indian is lawfully in possession of land in a reserve unless, with the approval of the Minister, possession of the land has been allotted to him by the council of the band.*
  - (2) *The Minister may issue to an Indian who is lawfully in possession of land in a reserve a certificate, to be called a Certificate of Possession, as evidence of his right to possession of the land described therein.*
  - (3) *For the purposes of this Indian Act, any person who, on the 4th day of September 1951, held a valid and subsisting Location Ticket issued under The Indian Act, 1880, or any statute relating to the same subject-matter, shall be deemed to be lawfully in possession of the land to which the location ticket relates and to hold a Certificate of Possession with respect thereto.*
22. *Where an Indian who is in possession of lands at the time they are included in a reserve made permanent improvements thereon before that time, he shall be deemed to be in lawful possession of such lands at the time they are included.*

### 4. Policy

- 4.1 **Duty of Lands Officer.** Lawful possession of a parcel of reserve land by an individual has important consequences for the individual, his or her heirs and assigns, and the First Nation overall. Consequently, a Lands Officer has a responsibility to ensure that both the individual and the First Nation council are in possession of all relevant information before an allotment is made.
- 4.2 It should also be emphasized that allotment is a serious process which, once approved, cannot be rescinded unless there has been a major defect in the allotment such as fraud or an incorrect description. (See Directive 3-6)
- 4.3 It should be emphasized that once the Minister's delegate approves an allotment, lawful possession of the lands is transferred whether the BCR is registered or not.

4.4 **Contents of BCR.** A BCR must contain the following information for a First Nation council to allot “a parcel” an allotment of land:

- a) The section of the Indian Act under which they are making the allotment;
- b) The full formal name and First Nation number of the person(s) to whom they are making the allotment. They should refer to the Indian Membership register for verification of correct names and First Nation numbers. In addition, married women should be identified by their given names;

Example: Mrs. Linda Jean Smith, No. 25 <i>not</i> Mrs. George Smith, No. 25.
--

- c) Where an individual is a First Nation member, but does not appear on the First Nation membership list, the First Nation must provide certification of the individual's membership;
- d) Where an individual is entitled to be registered under the *Indian Act*, but is not yet registered, the First Nation's must provide certification that the individual is entitled to be registered under the *Indian Act*;
- e) A land description which meets the requirements for legal descriptions of Indian lands, generally a Registration Plan or “an official plan” a Canada Land Survey Plan which and includes all known encumbrances affecting the parcel of land. Obtain further information by consulting the Indian Lands Registration Manual and the Interdepartmental Agreement respecting Legal Descriptions of Indian Lands, February 6, 1998;
- f) Where access to the allotted parcel is not available by a public or First Nation owned road, the allotment must provide access in conjunction with the land description. Access may be provided for in the allotment itself, it may be the subject of a separate transfer pursuant to section 24 of the *Indian Act* (see Directive 3-4), or access may be granted over adjacent lands by agreement with the lawful possessors of that land. For further information, consult the Indian Lands Registration Manual;
- g) The number forming a quorum of the First Nation council and the signatures of a quorum of the First Nation council.
- h) The date of the duly convened First Nation council meeting.

- 4.5 **Environmental Assessment Requirement.** Usually, an allotment does not incorporate a project proposal for future use of the allotted land. However, where the allotment does include a project proposal, the lands officer must determine whether the department requires an environmental assessment under the CEAA. If so, the environmental assessment must be conducted prior to Ministerial approval of the allotment. Allotments without a project proposal attached are not subject to an environmental assessment under the CEAA. For further information on environmental assessments, see Chapter 12.
- 4.6 **Recommendations for approval of allotments** from the Lands Officers should be based on a thorough consideration of the following criteria:
- a) **Status of Land.** Is the land to be allotted reserve land within the meaning of subsection 2(1) of the *Indian Act*? The definition of reserve under subsection 2(1) of the *Indian Act* expressly excludes designated lands for the purposes of section 20. Also, the council cannot allot lands which the First Nation has surrendered absolutely under section 38(1), because those lands no longer form part of the reserve. Further, a council cannot allot lands that have been allotted to another individual and are held via a CP, Cardex, NE or NETI.
  - b) **Compatibility of Third Party Rights.** Can the land be allotted to a First Nation member, or is it subject to third party encumbrances or other rights which are inconsistent with the proposed allotment (e.g. leases; lands set aside under ss. 18(2) for the benefit of all band members);
  - c) **Affect on First Nation.** Has the First Nation council confirmed that the allotment is in the best interests of the First Nation, ie: size of the parcel to be allotted must not be out of proportion in relation to the size of the reserve itself;
  - d) **Conformity with Development Plans or Zoning Bylaws.** Has the First Nation council confirmed that the allotment meets the requirements of any development plans or zoning bylaws which the First Nation council may have approved.
  - e) **Extent of Third Party Interests.** Is the proposed locatee aware of the interests to which the parcel of land is subject, such as pipelines, access roads and telephone lines?



- 4.7 Where the Lands Officer cannot satisfactorily resolve the above criteria in favour of the allotment, they should give the First Nation council an opportunity to reconsider its allotment choice considering the information provided.
- 4.8 Where the council decides to continue with the allotment, although it does not meet the above criteria, the Lands Officer should note the specific problems and unsatisfactory features of the allotment. He or she should submit this information, along with the BCR and recommendations, to the approving authority for consideration.
- 4.9 Where the allotment does not meet the criteria with respect to Status of Land or Compatibility of Third Party Rights as mentioned in section 4.6 a) and b) above, the subject lands are incapable of allotment and the approving authority cannot approve the allotment.
- 4.10 **Allotments to council members and members of their immediate families** raise the potential for a conflict of interest. Lands Officers should take precautions to ensure that they have informed the First Nation of the effects of the allotment. In these situations, the council should advise the council member, who is in a potential conflict of interest, not to participate in the allotment vote.
- 4.11 **Status of Possession.** Reserve land which the First Nation council has allotted to two or more First Nation members may be held by those individuals as joint tenants (right of survivorship) or as tenants in common (no right of survivorship). Where the locatees make no election when they acquire lawful possession, the interest will be recorded as held by the First Nation members as tenants in common. A full explanation of these terms, the process and consequences of electing to hold possessory rights as joint tenants or tenants in common can be found in the *Indian Lands Registration Manual*.
- 4.12 **Location Tickets.** Before enactment of the present day *Indian Act*, evidence of possession was by way of Location Ticket. Although Location Tickets continue to be valid evidence of lawful possession, Location Ticket holders should be encouraged to have their parcel legally surveyed and then to obtain a Certificate of Possession as evidence of lawful possession.
- 4.13 **Section 22 Claims.** Where it is claimed that an individual interest has been created by virtue of section 22 of the Indian Act (i.e. where a First Nation member in possession of non-reserve lands has made permanent improvements on the lands and the lands are subsequently included in a reserve) the matter should be reviewed in consultation with Headquarters.
- 4.14 Where section 22 applies, the First Nation member occupant is entitled to evidence of his or her possessory rights without requiring an allotment by the First Nation council.

- 4.15 Where new lands are set apart as reserve lands or as additions to existing reserve lands, Lands Officers should ensure the prior interest of the individual in occupation of such lands, who has made improvements thereon, are properly reported and recorded at the time of the inclusion or addition.
- 4.16 Where section 22 is applicable, inform the First Nation council of the circumstances with respect to the improvements before the lands are given reserve status. In this way, where the expectation is that the additional lands will be used as reserve lands, the First Nation council will have an opportunity to negotiate issues such as possession or compensation for improvements with the occupants.
- 4.17 The issue of compensation for improvements is a matter for negotiation between the occupant and the First Nation council. The Lands Officer's role is to provide information in the department's possession and encourage the parties to reach an agreement. Any information provided by the Lands Officer must be accurate and timely. For further information on compensation see Directive 3-7.

## 5. Process

- 5.1 This section provides an overview of how to allot land under section 20 of the *Indian Act*. A detailed checklist is included as Annex A to this Directive. First Nations exercising delegated authorities under section 60 of the *Indian Act* are responsible for taking the steps identified as the responsibility of **INAC Field** in the checklist. The Lands Officer should consult delegation instruments to confirm the scope of authority.
- 5.2 **Request from First Nation Council.** The First Nation council usually initiates the process by contacting the Lands Officer to confirm the status of a parcel of land which is being considered for allotment.
- 5.3 **Identify Land and Verify Status.** The Lands Officer, who has a responsibility to ensure all relevant information is conveyed to and considered by the First Nation before making an allotment, must review the pertinent information prior to allotment, by completing a comprehensive land status report on the parcel.
- 5.4 **Verify First Nation Member:** The Lands Officer must verify that the individual First Nation member is a registered member of the band or is entitled to be registered. In the case of a section 10 band, the First Nation must provide written confirmation of the individual's membership in that band.
- 5.5 **Practice varies among First Nations.** Some First Nation councils, such as those with section 60 delegation, may not require the assistance of the INAC Lands Officer to confirm the status of the land being considered for allotment.

**Contents of BCR (continued)**

- 5.6 **BCR.** The First Nation passes a BCR which meets the requirements of this policy, allotting possession of the parcel of land to the First Nation member(s). This requires a majority of council's vote [s. 2(3)(b)] *Indian Act*. The BCR and any supporting documentation are then forwarded to the Lands Officer. The First Nation council should undertake special BCR procedures where the allotment is to a council member or their immediate family (see policy requirements in section 4.10 of this Directive).
- 5.7 **Consideration of Allotment.** The Lands Officer considers the allotment and recommends it for approval or remits the allotment to the First Nation council for reconsideration. Where a project proposal is included in the allotment, the Lands Officer must ensure that, where required, the appropriate environmental assessment has been conducted.
- 5.8 **Recommendation for Approval.** If the allotment is recommended for approval, the Lands Officer submits the BCR and supporting documentation to the approving authority.
- 5.9 **Ministerial or Departmental Approval.** The authority approving the allotment for the Minister then approves or rejects the allotment according to department policies. If the authority approves it, the approved allotment is registered in the Indian Lands Registry by application to register the BCR. Where Ministerial approval is withheld, the First Nation is so advised.
- 5.10 Once the allotment has been registered, the Registrar of Indian Lands will issue a Certificate of Possession.
- 5.11 A request for **replacement of a Location Ticket, Cardex, NE or NETI** and substitution with a Certificate of Possession may originate with a simple statement signed by the individual. This statement may explain that the individual wishes to cancel the LT, Cardex, NE or NETI and replace it with a Certificate of Possession describing the parcel of land by its most recent description. Note: If the interest is unsurveyed a legal survey would be required before it could be replaced by a Certificate of Possession.
- 5.12 The Lands Officer then forwards this request to the Registrar of Indian Lands who will issue a Certificate of Possession.

## **6. References**

- 6.1 For more information refer to the Indian Lands Registration Manual.

**Directive 3-2: Creating Individual Interests**

**Annex A: Checklist**



## Checklist Creating Individual Interests - Allotment

1	<p><b>First Nation:</b> Where applicable, identifies the proposed parcel of land for allotment and notifies the region or district.</p>	
2	<p><b>INAC Field:</b> Where applicable, checks the status of the land to be allotted and provides First Nation with relevant information.</p>	
3	<p><b>First Nation:</b> Passes BCR allotting possession of the parcel of land to the First Nation member(s) which must include:</p> <ul style="list-style-type: none"> <li>a) the section of the Indian Act under which the council makes the allotment</li> <li>b) the full formal name of the person(s) to whom the allotment is being made</li> <li>c) the First Nation number of the person(s) to whom the allotment is being made</li> <li>d) the First Nation's certification of the individual's membership in the First Nation, and right to be registered under the Indian Act (if applicable)</li> <li>e) a land description which meets the requirements for legal descriptions of Indian Lands, including all known encumbrances affecting that land</li> <li>f) an allocation of access in conjunction with the land description</li> <li>g) the number constituting a quorum of the First Nation council</li> <li>h) the signatures of a quorum of the First Nation council</li> </ul>	
4	Where an allotment is to a council member or their immediate family, the council member cannot participate in the council allotment vote.	
5	Forwards the BCR and any supporting documentation to the Lands Officer.	

6	<p><b>INAC Field:</b>                  Considers the allotment for approval having regard to the following criteria:</p> <ul style="list-style-type: none"> <li>a) whether the BCR is correct and duly passed by a quorum of the First Nation council</li> <li>b) whether the land to be allotted is described properly</li> <li>c) confirmation by council that the allotment is in the best interests of the First Nation</li> <li>d) confirmation by council that the allotment meets the requirements of the First Nation's approved or pending development plans and zoning bylaws</li> <li>e) whether any third party rights inconsistent with the proposed allotment are present</li> <li>f) whether the proposed locatee is aware of the third party interests to which the parcel of land is subject</li> <li>g) if the allotment is to a council member or their immediate family, evidence that the council member did not participate in the allotment vote.</li> </ul>	
7	Ensures environmental assessment has been conducted according to CEAA, if applicable.	
8	If the above criteria are not satisfied, returns documentation to the First Nation for reconsideration.	
9	If the council decides to continue with the allotment, submits for consideration by the authority approving the allotment for the Minister, a record of the specific problems and unsatisfactory features of the allotment, along with the BCR and recommendations.	
10	If the necessary criteria are satisfied, submits the documentation to the approving authority with a recommendation for approval.	
11	Upon approval being granted, applies to register BCR.	
12	<p><b>INAC H.Q.:</b>                  Checks all documentation against the criteria in the <i>Indian Lands Registration Manual</i>.</p>	
13	Where applicable, verifies that the locatee is registered, or entitled to be registered, under the <i>Indian Act</i> and is a First Nation member.	
14	Registers the BCR following the <i>Indian Lands Registration Manual</i> .	



15	Issues Certificate of Possession when applicable.	
16	<b>INAC Field:</b> Retains the registered Certificate of Possession on file or forwards C.P. to locatee, keeping copy of registered Certificate of Possession on file.	

## Directive 3-3

### Temporary Possession

#### 1. Purpose

- 1.1 This directive explains what happens when the First Nation council allots possession of land, but Ministerial approval of the allotment is withheld pending fulfilment of certain conditions. Read this directive for information about the authorization of temporary possession of land which the First Nation council has allotted, the resulting issuance of a Certificate of Occupation, extending the term of a Certificate of Occupation, and the termination of temporary possession through the subsequent grant or refusal of an allotment.

#### 2. General

- 2.1 Pursuant to subsection 20(4) of the *Indian Act*, where the First Nation council allots possession of a parcel of land, the Minister may withhold approval of the allotment, grant temporary occupation of the land to the proposed locatee, and prescribe conditions as to use and settlement that the locatee must meet before the Minister approves the allotment. Note, however, that these provisions are very rarely used.
- 2.2 In practice, the First Nation council decides whether to recommend conditions as to use and settlement, however, the Lands Officer who reviews the allotment may suggest conditions to the First Nation.
- 2.3 Where the Minister grants temporary possession, a Certificate of Occupation is issued pursuant to subsection 20(5) of the *Indian Act*. This certificate entitles the individual, and those claiming through the individual by devise or descent, to temporarily occupy the land which is the subject of the allotment. The Certificate of Occupation also identifies the term of occupation. The original term of the temporary occupation is for a period of up to two years from the date of its issue. The Minister may extend this period pursuant to subsection 20(6) of the *Indian Act* for a subsequent period not exceeding two years. The *Indian Act* does not provide for any additional extensions.
- 2.4 Where the locatee has fulfilled the prescribed conditions, the Lands Officer may submit the allotment to the approving authority where, upon approval, the Minister will issue a Certificate of Possession.

- 2.5 Where there is a noncompliance with the conditions, the Minister may grant an extension of the temporary possession according to the *Indian Act*, or the allotment may be refused and the First Nation council notified that the land is available for re-allotment. The First Nation may also choose to waive the conditions that it set for the proposed locatee and go ahead with the allotment.

### 3. Authorities

#### 3.1 Relevant statutory authorities include:

*Indian Act*, ss. 20(4) - 20(6)

20. (4) *Where possession of land in a reserve has been allotted to an Indian by the council of the band, the Minister may, in his discretion, withhold his approval and may authorize the Indian to occupy the land temporarily and may prescribe the conditions as to use and settlement that are to be fulfilled by the Indian before the Minister approves of the allotment.*
- (5) *Where the Minister withholds approval pursuant to subsection (4), he shall issue a Certificate of Occupation to the Indian, and the Certificate entitles the Indian, or those claiming possession by devise or descent, to occupy the land in respect of which it is issued for a period of two years from the date thereof.*
- (6) *The Minister may extend the term of a Certificate of Occupation for a further period not exceeding two years, and may, at the expiration of any period during which a Certificate of Occupation is in force*
- (a) *approve the allotment by the council of the band and issue a Certificate of Possession if in his opinion the conditions as to use and settlement have been fulfilled; or*
- (b) *refuse approval of the allotment by the council of the band and declare the land in respect of which the Certificate of Occupation was issued to be available for re-allotment by the council of the band.*

## 4. Policy

- 4.1 **Prescribing Conditions.** As a matter of policy, the First Nation council may recommend conditions which the locatee must fulfill before they make an allotment.

Example: A typical condition might require that the First Nation member complete the foundation for a house within two years of being granted temporary possession of the lands, to be eligible for complete lawful possession.

- 4.2 When considering a proposed allotment, a Lands Officer may recommend to the First Nation council temporary possession of the land in question, pending fulfilment of certain conditions. It is the First Nation council, however, which must decide if it wishes to proceed in this manner.
- 4.3 Where a First Nation member must fulfil conditions before an allotment is finalized, the council should pass a BCR which reflects the following:
- a) complete lawful possession is conditional upon the fulfilment of the conditions prescribed in the BCR; and,
  - b) the council will grant temporary possession to the First Nation member pending fulfilment of the conditions.
- 4.4 The Lands Officer reviews the documentation submitted by the First Nation council, and prepares a report and recommendation which he or she submits to the approving authority, with the BCR granting temporary possession and any other supporting documentation.
- 4.5 Conditions submitted must be reasonable, and capable of compliance within a period of two years.
- 4.6 **Temporary possession is not "lawful possession"** within the meaning of subsection 20(1) of the *Indian Act*. As a result, the First Nation member cannot transfer or dispose of the subject lands except by devise or descent. Where temporary possession of the land is transferred by devise or descent, the heirs-at-law or the beneficiaries must fulfil the stated conditions to be eligible for complete lawful possession.

- 4.7 **Environmental Assessment.** Although it is uncommon, it is possible that a request for temporary possession or subsequent allotment may include a project proposal. In such cases, the Lands Officer must determine whether the Department requires an environmental assessment under the CEEA. If so, the Lands Officer must ensure that an environmental assessment is conducted prior to Ministerial authorization of the temporary possession or the subsequent allotment, as applicable. For more information on environmental assessments see Chapter 12.
- 4.8 **Term of Possession.** While the Minister may allow temporary possession for a period of two years, lesser periods may be appropriate where desired by the First Nation council and approved by the Minister.
- 4.9 **Extension of Term.** According to the provisions of subsection 20(6) of the *Indian Act*, the term of a Certificate of Occupation may be extended for a second period not exceeding two years. There is no authority for additional extensions.
- 4.10 Either the holder of the Certificate of Occupation or the First Nation council may submit requests for an extension pursuant to subsection 20(6) of the *Indian Act*. Requests for an extension by the individual concerned should always be supported by an appropriate BCR.
- 4.11 Where a First Nation council either opposes or otherwise fails to support an individual's request for an extension, the Lands Officer must investigate the circumstances. The Lands Officer must submit a report containing the officer's recommendations to the appropriate approving authority.
- 4.12 **Compliance with Conditions.** The Lands Officer should obtain First Nation council agreement that the conditions have been met. This agreement would usually be in the form of a BCR. Where the First Nation council has established that the member has met the specified conditions as to use and settlement, the Lands Officer may submit to the appropriate authority a recommendation for approval of the allotment. The documentation indicating compliance with the prescribed conditions and making the allotment must be attached to the recommendation.
- 4.13 **Noncompliance with Conditions.** Where there is sufficient information showing noncompliance with the conditions at the end of any initial or extension period during which a Certificate of Occupation is in force, the Lands Officers should investigate the circumstances of the noncompliance and submit the appropriate report and recommendations to the First Nation council for confirmation.

- 4.14 Where there is noncompliance with the conditions at the end of any initial or extension period during which a CO is in force, the First Nation council may waive the conditions and go ahead with the allotment.
- 4.15 A detailed checklist is included as Annex A to this Directive. Please note that those First Nations exercising delegated authorities under section 60 of the *Indian Act* are responsible for taking the steps identified as the responsibility of **INAC Field** in the checklist. Consult delegation instruments to confirm the scope of authority.

## 5. Process: Authorization of Temporary Possession

- 5.1 This section provides an overview of the process for the granting of temporary possession where an allotment of land is conditional upon the fulfilment of certain prescribed conditions. These steps are besides the steps required to complete an allotment as detailed in Directive 3-2.
- 5.2 **Lands Officer Recommending Temporary Possession.** The Lands Officer, when considering an allotment, determines whether to recommend it for approval. In doing so, the Lands Officer may recommend to the First Nation council the option of temporary possession, requiring that the First Nation member fulfil certain conditions before the Minister approves the allotment. In these cases, however, it is the First Nation council that decides how it would like to proceed.
- 5.3 **BCR.** The First Nation council passes a BCR granting possession of the parcel of land to the First Nation member(s). This must be done according to Directive 3-2 and this policy. The First Nation council forwards the applicable BCR to the Lands Officer.
- 5.4 Usually, the BCR will grant temporary possession of the lands to a First Nation member and prescribe conditions for complete lawful possession, citing subsection 20(4) of the *Indian Act*. Upon fulfilment of the specified conditions, the First Nation council passes a second BCR allotting the parcel of land, quoting subsection 20(1) of the *Indian Act*.

- 5.5 Practice may vary. The First Nation council may pass a single BCR quoting subsections 20(1) and (4) which makes the allotment, grants temporary possession of the lands, and specifies the conditions which the member must fulfil before permanent entitlement to the lands is granted. Once the member has met the conditions, the First Nation passes a second BCR indicating compliance which is then forwarded to the Lands Officer. Alternatively, the First Nation council may notify the Lands Officer of compliance by way of a letter.
- 5.6 Where the Lands Officer receives a BCR which prescribes conditions for complete lawful possession of the subject lands, the Lands Officer reviews these conditions. Where a project proposal is included, the Lands Officer ensures that, where required, the appropriate environmental assessment has been conducted. The Lands Officer then submits his or her report and recommendation to the approving authority.
- 5.7 Upon approval, the requisite documentation is forwarded to the Registrar of Indian Lands for registration.
- 5.8 **Certificate of Occupation.** Where the Minister authorizes temporary possession, the Registrar of Indian Lands issues a Certificate of Occupation under subsection 20(5). This Certificate sets out the conditions that the member must fulfil and the term of occupation.

## 6. Process: Extension of Temporary Possession

- 6.1 **Requests for Extension.** The holder of the certificate may submit requests for an extension to the First Nation council, or with a supporting BCR, to the Lands Officer.
- 6.2 The Lands Officer reviews the BCR and forwards it to the approving authority for approval.
- 6.3 Upon approval, the BCR is registered and a new Certificate of Occupation is issued.

## 7. Process: Expiration of Temporary Possession

- 7.1 **Compliance with Conditions.** Where the member has fulfilled the prescribed conditions, the First Nation council submits the appropriate documentation to the Lands Officer. The Lands Officer reviews the material and submits it to the approving authority. Upon approval, an application to register, along with the relevant documentation, is forwarded to the Registrar of Indian Lands who registers it and issues a Certificate of Possession.
- 7.2 **Noncompliance with Conditions.** Where, at the end of any initial or extension period during which a Certificate of Occupation is in force, the Lands Officer has not been advised whether the member has fulfilled the prescribed conditions, the Lands Officer should investigate the circumstances of the noncompliance and submit the appropriate report and recommendations to the First Nation council for confirmation.
- 7.3 **Waiving Conditions.** Where there is noncompliance with the conditions at the end of any initial or extension period during which a Certificate of Occupation is in force, the First Nation council may pass a BCR waiving fulfilment of the conditions and allotting the lands to the First Nation member. The allotment then continues as set out in Directive 03-02.
- 7.4 If noncompliance with the conditions exists at the end of the two-year extension period and the conditions have not been waived by the First Nation council, the Minister must refuse approval of the allotment and declare the subject lands available for re-allotment.

## 8. References

- 8.1 Besides the relevant sections of the legislation, more information may be found in the following:
- a) *Indian Lands Registration Manual*
  - b) *Estates Procedures Manual*, September 14, 1994



**Directive 3-3: Temporary Possession**

**Annex A: Checklist**



## Checklist Authorization of Temporary Possession

1	<p><b>INAC Field:</b> Where appropriate, recommends conditions to the First Nation council upon which the allotment might be made contingent.</p>	
2	<p><b>First Nation:</b> Passes BCR granting temporary possession of the parcel of land to the First Nation member(s) following Directive 3-2 and this policy. This BCR may also allot the subject lands and must reflect the following: a) complete lawful possession is conditional upon the fulfilment of the conditions prescribed therein; and b) the First Nation member is granted temporary possession pending fulfilment of the conditions.</p>	
3	Forwards the BCR and any supporting documentation to the Lands Officer.	
4	<p><b>INAC Field:</b> Considers the land transaction for approval having regard to the criteria in Directive 3-2.</p>	
5	Ensures Environmental Assessment has been conducted in accordance with CEAA, if applicable.	
6	Reviews and reports on conditions in BCR.	
7	<p>Ensures conditions meet the following criteria: a) reasonable b) capable of compliance within two years.</p>	
8	<p>Submits following documentation for Ministerial authorization: a) BCR b) report on conditions c) any other supporting documentation d) recommendation for Ministerial authorization.</p>	
9	Obtains Ministerial authorization.	

10	Forwards documentation to <b>INAC H.Q.</b> for registration.	
11	<b>INAC H.Q.:</b> Checks all documentation submitted for registration against the criteria in the <i>Indian Lands Registration Manual</i> .	
12	Where applicable, verifies individual being granted temporary possession is registered or entitled to be registered under the <i>Indian Act</i> and is a First Nation member.	
13	Registers the BCR according to requirements set out in the <i>Indian Lands Registration Manual</i> .	
14	Issues Certificate of Occupation setting out the conditions to be fulfilled by the individual and the term of the occupation.	

### Extension of Temporary Possession

15	<b>First Nation:</b> Where an extension of the term of Certificate of Occupation is requested, passes BCR for this purpose.	
16	Submits request for extension with supporting BCR to Lands Officer.	
17	<b>INAC Field:</b> Reviews BCR, then forwards BCR and report with recommendations to the appropriate approving authority.	
18	Approving authority grants or refuses extension.	
19	Where an extension is granted, submits documentation for registration	
20	<b>INAC H.Q.:</b> Checks all documentation submitted for registration against the criteria in the <i>Indian Lands Registration Manual</i> .	
21	Registers the BCR following the <i>Indian Lands Registration Manual</i> .	
22	Issues new Certificate of Occupation	

### Expiration of Temporary Possession

23	<p><b>First Nation:</b> Determines compliance with conditions and</p> <p>a) where conditions have been met, passes and forwards to Lands Officer a BCR allotting subject lands to the First Nation member(s); or</p> <p>b) where lands were allotted in first BCR, gives Lands Officer notification of compliance with conditions; or</p> <p>c) waives conditions, passes BCR allotting the subject lands to the First Nation member(s) and forwards that BCR to the Lands Officer.</p>	
24	<p><b>INAC Field:</b> Where the First Nation Council passes and forwards a BCR allotting the subject lands to the First Nation member(s), processes the allotment following Directive 3-2.</p>	
25	Where the council advises that the member has met the conditions, during the original term or authorized extension, forwards to the appropriate approving authority a recommendation for approval of the allotment, showing compliance with conditions, along with the BCR or other supporting documentation.	
26	Upon approval, forwards the application to register, along with relevant supporting documentation, to the Registrar of Indian Lands for registration.	
27	Where there is noncompliance with the conditions at the end of the initial term of occupation, or an extension period, prepares a report and submits recommendations to the First Nation council for confirmation.	
28	Where it is confirmed that the member has not fulfilled the conditions at the end of the two-year extension period, advises First Nation member and First Nation council that Certificate of Occupation is no longer in effect and the lands are available for reallocation.	
29	<p><b>INAC H.Q.:</b> Checks all documentation submitted for registration against the criteria in the <i>Indian Lands Registration Manual</i>.</p>	
30	Registers the BCR following the <i>Indian Lands Registration Manual</i> requirements.	
31	Issues Certificate of Possession when applicable.	

## Directive 3-4

# Transferring Individual Interests

### 1. Purpose

- 1.1 This directive explains how a locatee may transfer possession of reserve lands pursuant to section 24 of the *Indian Act*. You should read this directive for information on:
- a) **Policy:** It states the principles and requirements governing the transfer of lawful possession of reserve lands.
  - b) **Procedures:** It outlines the steps in the transfer process.

### 2. General

- 2.1 Generally, a First Nation member in lawful possession of reserve lands may transfer that right to possession to the First Nation or to another member of the First Nation.
- 2.2 It is the "right to possession" which the locatee can transfer under section 24 of the *Indian Act*. Legal title to the land in question remains vested in Her Majesty in right of Canada.
- 2.3 Any proposed transfer under this section 24 of the *Indian Act* requires Ministerial approval. The Minister will only grant this approval where the policy and procedure requirements of this directive have been satisfied.

### 3. Definitions

- a) **"Transferor"** means the person transferring the right to lawful possession.
- b) **"Transferee"** means the person receiving the right to lawful possession.

## 4. Authorities

### 4.1 Relevant statutory authorities include:

*Indian Act*, s. 24, ss. 28(1), & s. 49

24. *An Indian who is lawfully in possession of lands in a reserve may transfer to the band or another member of the band the right to possession of the land, but no transfer or agreement for the transfer of the right to possession of lands in a reserve is effective until it is approved by the Minister.*

28. (1) *Subject to subsection (2), any deed, lease, contract, instrument, document or agreement of any kind, whether written or oral, by which a band or a member of a band purports to permit a person other than a member of that band to occupy or use a reserve or to reside or otherwise exercise any rights on a reserve is void.*

49. *A person who claims to be entitled to possession or occupation of lands in a reserve by devise or descent shall be deemed not to be in lawful possession or occupation of those lands until the possession is approved by the Minister.*

## 5. Policy

### 5.1 **Transfer Criteria.** Any application to transfer the right to possession of reserve lands must meet the following criteria:

- a) **Lawful Possession.** Only "lawful" possession may be transferred. Therefore, a locatee may transfer rights of possession acquired under the *Indian Act* pursuant to subsections 20(1) and (3) or sections 22, 24 or section 48 with section 49 approval to another First Nation member(s) or to the First Nation.
- b) Certain First Nations recognize **traditional or custom holdings** by individuals and grant "occupational rights at the pleasure of the First Nation council." These rights are not "lawful possession" under the *Indian Act*, and therefore are incapable of transfer pursuant to section 24.
- c) **Transferee.** A locatee can only transfer his or her right to possession to the First Nation or to another member of that First Nation. Further, pursuant to the provisions of section 28(1) of the *Indian Act*, any purported transfer to an individual other than a member of that First Nation is void.

**Transfer Criteria (continued)**

- d) The **transferor** must be **in lawful possession** of the lands to be transferred.
- e) The land must not be subject to any **encumbrances** inconsistent with the transfer.

**5.2 Transfer Document.** The transfer document must meet the following criteria:

- a) The transfer should be submitted in the prescribed form, "Transfer of Land on an Indian Reserve." A transfer submitted in another form may be acceptable providing it conforms to all the prescribed criteria and otherwise contains all the essential information.
- b) The name and the band number of the transferor must appear as it appears in the Indian Land Registry System or Band Membership records for those First Nations that have their own membership code. Therefore, if there is a difference between the abstract and the membership records, then this should be noted as follows:  
  
"Mary A. Smith Now Known As Mary A. Jones"
- c) The registered names and numbers of both the transferor and transferee must be used in the transfer. Again as stated in 5.2 b) if the transferor's name and or number has been changed in the Indian Registry, but appears different in the Indian Lands Registry it should be shown as follows: "Mary A. Smith, No. 25 N.K.A. Mary A. Jones No. 30"
- d) If the member has an alias registered in the Indian Registry that alias could also appear on the transfer document especially if the individual signs their name using the alias. For example: "Mary A. Smith Also Known As Abbey Smith"
- e) The transfer must include a land description which meets the requirements for legal descriptions of Indian lands and includes all known encumbrances affecting the land. Further information may be found in the *Indian Lands Registration Manual*, and in the *Interdepartmental Agreement Respecting Legal Descriptions of Indian Lands*, February 6, 1998 as amended from time to time.



## Transfer Document (continued)

- f) The transfer must include a recital that the transferor makes the transfer for consideration
- g) The transfer must include the witnessed signature of the transferor. To confirm the identity of the person signing the document, the signature should be identical to the name as it appears on the face of the document.

Example: If the transferor is described as "Harry T. Jacobs" on the face of the transfer document, he should sign his name as "Harry T. Jacobs."

The transferee is not required to sign the document.

- h) The transfer must also meet the registration and execution of instruments requirements set out in Parts I and II of the *Indian Lands Registration Manual*.

**5.3 Environmental Assessment.** Although it is uncommon, should the transfer include a project proposal, the Lands Officer must determine whether the Department requires an environmental assessment under the *CEAA*. If so, the environmental assessment must be conducted prior to Ministerial approval of the transfer. Transfers without a project proposal attached do not require an environmental assessment under *CEAA*. For further information on environmental assessments see Chapter 12.

- 5.4 **Council Consent.** The *Indian Act* does not require the approval of the First Nation council for a transfer of an allotment. However, some First Nations have established procedures under which locatees submit all proposed transfers for council's approval before they are sent to the department for Ministerial approval. The Lands Officer should respect a First Nation's practice up to the extent where the council has unreasonably delayed a transfer or where the rights of the individual member have been infringed upon. In these instances the Lands Officer has an obligation and the authority to submit a transfer for Ministerial approval and registration without First Nation council approval.
- 5.5 **Reporting Unusual Circumstances.** If the Lands Officer receives a transfer document which is "correct" on its face, meeting the criteria set out in paragraphs 5.1 and 5.2 of this directive, then the document should be forwarded to the relevant authority for Ministerial approval. However, where the Lands Officer is aware of unusual circumstances relating to a proposed transfer, which may affect the validity of that transfer, a report on these circumstances should accompany the transfer document.
- 5.6 "Unusual circumstances" may include a transfer contested by a third party, or such things as medical evidence or evidence as to the capacity of the transferor.
- 5.7 Where the approving authority, having regard to the report of the Lands Officer, is not satisfied with the validity of the transfer document, Ministerial approval will be withheld. The transfer is then returned to the individual tendering the document, along with the reasons for the withholding of consent.
- 5.8 **Overturing a Transfer.** Where a third party has contested an approved transfer, the Lands Officer should advise those contesting the transfer that their remedy lies with the courts.
- 5.9 **Transfers to Minors.** Although a locatee may transfer lawful possession to a minor, the minor may be unable to effectively manage the transferred property. The Lands Officers should advise the locatee that the appointment of a guardian to manage the minor's property may be beneficial.

- 5.10 **Transfers by Devisee or Heir-at-law.** Lands officers should ensure that executors or administrators are aware that the transfer of lawful possession by devise or descent is not effective until the Minister approves it pursuant to the provisions of section 49 of the *Indian Act*. This information is very important where the devisee or heir-at-law is planning to immediately dispose of his or her interest in the subject lands following his or her inheritance.
- 5.11 **Transfer of Cardex Holdings.** Generally, the holder of a Cardex Holding has lawful possession under the *Indian Act*. However, First Nation members with Cardex Holdings cannot register a transfer of their interest unless they first obtain a land description which meets the requirements for legal descriptions of Indian lands. The Cardex Holding may be transferred to the First Nation without the requirement for a survey.
- 5.12 **Estate Transfer of Cardex Holding.** The Department has developed special procedures to allow the transfer of a Cardex Holding from an estate to its heirs or beneficiaries.
- 5.13 **Transfer of Notices of Entitlement (NE).** As with a Cardex Holding, to register a transfer under section 24 of the *Indian Act*, the holder of a Notice of Entitlement must obtain a proper legal description of the lands which meets the registration criteria for a transfer under this section.
- 5.14 **No Evidence of Title Issued (NETI).** A parcel received a NETI notation in the Indian Lands Registry when the holding was not yet legally surveyed. Consequently, registered documents were reflected on title, the transaction effectively transferred lawful possession, but the department did not issue any evidence of title. **This practice no longer exists.**
- 5.15 **Transfer to an Estate.** Notwithstanding 5.14, to deal with the backlog of estate transfers which existed a few years ago, the Registrar permitted estate transfers of interests in reserve lands to be registered although they did not meet the prescribed registration criteria then in place (i.e. no legal survey or it was a transfer from one estate to the other). These interests were registered as NETIs. Currently, NETI is only used where a lawful possessor transfers an interest in reserve land to an estate. Although the transfer document must meet the registration requirements referred to in this directive, the Indian Lands Registry issues no certificate of possession, as the interest will subsequently be transferred to the estate's heirs or beneficiaries.

## 6. Process

6.1 This section provides an overview of the process to transfer lawful possession under section 24 of the *Indian Act*. We include a detailed checklist as Annex A to this Directive. Please note that First Nations exercising delegated authorities under section 60 of the *Indian Act* are responsible for taking the steps identified as the responsibility of **INAC Field** in the checklist. Consult the delegation instruments to confirm the scope of authority.

6.2 **Transfers by Devise or Descent.** The Department has adopted special forms and procedures for estate transfers. Refer to the *Estates Procedures Manual*, September 14, 1994 for additional information.

A transfer of lawful possession is usually prepared at the First Nation offices. However, individual members may request a Lands Officer to assist them with the transfer of their interest. A lawyer or agent representing one or both of the parties may also prepare the transfer documentation.

6.3 **Search of Abstract.** When the Lands Officer receives the transfer documentation, the officer searches the Reserve General Abstract and the Reserve Parcel Abstract. These searches will confirm whether the transferor (the person granting the right to possession) is in lawful possession of the land to be transferred. The searches will also confirm whether the name of the transferor as it appears on the transfer document matches the appropriate abstract entry. Further, if the land search shows that the property is subject to a mortgage, the mortgage must be assumed or discharged prior to approval of the transfer.

6.4 **Search of Membership Records.** The Lands Officer may conduct a search of the Indian Register to ensure the transferee (the person getting the interest) is a member of that First Nation and has status under the *Indian Act*. In the case of a Section 10 band, the First Nation must provide written confirmation of the transferee's membership in that band.

- 6.5 **Review of Transfer Document.** The Lands Officer reviews the transfer document to ensure it meets the policy requirements in this directive, including:
- a) Form of Transfer Document;
  - b) Land Description and Access;
  - c) Encumbrances;
  - d) Consideration;
  - e) Execution by Transferor; and,
  - f) Verification of the Registration and Execution of Instruments requirements set out in Parts I and II of the *Indian Lands Registration Manual*.
- 6.6 **Environmental Assessment.** If a project proposal is included in the transfer, the Lands Officer ensures that an environmental assessment has been conducted in accordance with the CEAA. See Chapter 12 for detailed information.
- 6.7 **Report of Unusual Circumstances.** The Lands Officer prepares a report detailing those circumstances which question the validity of the transfer document.
- 6.8 **Approval and Registration.** The Lands Officer submits to the approving authority:
- a) the completed transfer, in duplicate;
  - b) the original and any copies of the documentation evidencing lawful possession of the transferor;
  - c) any supporting report; and,
  - d) his or her recommendation for approval.

- 6.9 Once approved, the Lands Officer submits the transfer and supporting documentation to the Indian Lands Registry under the cover of an "Application for Registration."
- 6.10 Upon registration of the transfer, the Registrar issues a Certificate of Possession in the name of the transferee unless the transfer is to the First Nation.

## 7. References

- 7.1 Besides the relevant sections of the legislation further information may be found in the following:
- a) *Indian Lands Registration Manual*
  - b) *Estates Procedures Manual*, September 14, 1994
  - c) *Interdepartmental Agreement Respecting Legal Descriptions of Indian Lands*, December 1993.

**Directive 3-4: Transferring Individual Interests**

**Annex A: Checklist**





## Checklist Transferring Individual Interests

1	<b>First Nation:</b> Prepares the documentation for the transfer of lawful possession.	
2	Where required, seeks the assistance of the Lands Officer to prepare the documentation.	
3	<b>INAC Field:</b> When required, provides assistance to First Nation in preparing the transfer documents.	
4	<b>First Nation:</b> Forwards the transfer and supporting documentation to Lands Officer.	
5	<b>INAC Field:</b> Where there has been a transfer by devise or descent (s.49), ensures that the executors or administrators are aware that lawful possession by transferees is not effective until the Minister approves the transfer.	
6	Searches the Reserve General Abstract and the Reserve Parcel Abstract to confirm that:  a) the transferor is in lawful possession of the land to be transferred; b) the name of the transferor as it appears on the transfer document matches the appropriate abstract entry; c) the land is not subject to any encumbrances inconsistent with the transfer	
7	Searches the First Nation membership records to ensure that the transferee is a First Nation member, if applicable.	
8	Where the transferee is a First Nation member, but does not appear on the First Nation membership list, ensures that the First Nation has certified the individual's membership.	

9	<p><b>INAC Field:</b> Where the transferee is entitled to register under the <i>Indian Act</i>, but is not yet registered under that Indian Act, ensures that the First Nation has certified that the individual is entitled to be registered under the <i>Indian Act</i>.</p>	
10	<p>Reviews the transfer document to ensure it meets the following requirements:</p> <ul style="list-style-type: none"> <li>a) it is in the prescribed form;</li> <li>b) the correct names of the transferor, the transferee and their respective First Nation numbers appear on the document;</li> <li>c) the land description meets the requirements for legal descriptions of Indian lands;</li> <li>d) the land description includes all known encumbrances affecting the land;</li> <li>e) if the land is subject to a mortgage, the mortgage has been assumed or discharged;</li> <li>f) if the land is subject to a Notice (caveat), the Notice has been removed or the party has been advised;</li> <li>g) includes a recital that the land is being transferred for valuable consideration;</li> <li>h) where consideration is nominal, includes a satisfactory explanation for the nominal consideration;</li> <li>i) includes the witnessed signature of the transferor, preferably identical to the name as it appears on the face of the document; and</li> <li>j) complies with the registration and execution of instruments requirements set out in Parts I and II of the <i>Indian Lands Registration Manual</i>.</li> </ul>	
11	Addresses concerns of First Nation, if applicable.	
12	If a project proposal is presented, ensures that an environmental assessment has been conducted according to <i>CEAA</i> .	
13	If applicable, prepares report detailing the circumstances which question the validity of the transfer document.	
14	<p>Submits the following to the authority approving the transfer for the Minister:</p> <ul style="list-style-type: none"> <li>a) completed transfer, in duplicate</li> <li>b) original and any copies of the documentation which proves lawful possession of the transferor</li> <li>c) supporting report</li> <li>d) recommendation for approval</li> </ul>	

15	<b>INAC Field:</b> The transfer is approved or rejected by approving authority.	
16	Submits the approved transfer and supporting documentation to the Indian Lands Registry under the cover of an "Application to Register."	
17	<b>INAC H.Q.:</b> Checks all documentation against the criteria set out in the <i>Indian Lands Registration Manual</i> .	
18	Where applicable, verifies that the transferee is registered under the <i>Indian Act</i> and is a First nation member.	
19	Registers the transfer according to the <i>Indian Lands Registration Manual</i> .	
20	Upon registration of the transfer, the Registrar issues a Certificate of Possession in the name of the transferee, unless the transfer is to the First Nation.	
21	<b>INAC Field:</b> Retains the registered Certificate of Possession on file and sends a copy to the transferee or forwards the CP to the transferee, keeping a copy of the registered Certificate of Possession on file.	

## Directive 3-5

### Reversion of Right to Possession

#### 1. Purpose

- 1.1 This directive explains how the right to lawful possession of reserve lands may revert to the First Nation, or be transferred to the First Nation or a member thereof, pursuant to section 25 of the *Indian Act*. You should read this directive for information on:
- a) **Policy:** It states the principles and requirements governing the transfer of lawful possession where a First Nation member ceases to be entitled to live on reserve lands.
  - b) **Procedures:** It outlines the steps to take when a First Nation member in lawful possession of reserve lands ceases to be entitled to live on reserve lands.

#### 2. General

- 2.1 When First Nation members cease to be entitled to live on reserve lands, subsection 25(1) of the *Indian Act* mandates that they must transfer their rights of possession to the First Nation or to another member. In addition, the transfer must be completed within six months, or an extension of that period, as directed by the Minister.
- 2.2 Where a transfer under subsection 25(1) is not completed within the initial six months or an extension of that period, the right to possession of the lands reverts to the First Nation by virtue of subsection 25(2).
- 2.3 Where the land reverts to the First Nation under subsection 25(2), the individual formerly in lawful possession of the land is entitled to receive compensation for permanent improvements that he or she made on the land. This compensation is from the funds of the First Nation, in an amount agreed to by the parties or determined by the Minister.

### 3. Authorities

#### 3.1 Relevant statutory authorities include:

*Indian Act*, c. I-5, s. 25

25. (1) An Indian who ceases to be entitled to reside on a reserve may, within six months or such further period as the Minister may direct, transfer to the band or another member of the band the right to possession of any lands in the reserve of which he was lawfully in possession.

(2) Where an Indian does not dispose of his right of possession in accordance with subsection (1), the right to possession of the land reverts to the band, subject to the payment to the Indian who was lawfully in possession of the land, from the funds of the band, of such compensation for permanent improvements as the Minister may determine.

### 4. Policy

4.1 **Notice.** As soon as a Lands Officer becomes aware that a member with lawful possession becomes ineligible to continue to hold reserve lands, they should provide notice of the provisions under section 25 to the First Nation council and the affected locatees. The First Nation must provide notice in writing to the member that they must dispose of their lawful possession within the six month period.

4.2 **Transfer within the Six Month Period.** Where a transfer pursuant to section 25(1) falls within the specified six month period, the transfer is completed in the same manner as a transfer under section 24 of the *Indian Act* (see Directive 3-4).

4.3 **Extensions.** A Locatee who becomes aware that he/she will not be able to transfer their lawful possession of reserve land within the original six month period, he/she should contact the Lands Officer and submit a request for an extension of the six-month period specified in subsection 25(1). Requests received after the expiration of the six month period will usually be refused but should be reviewed on a case-by-case basis.

- 4.4 A request for an extension is usually supported by a recommendation from the First Nation council. If the First Nation council does not support the request for an extension, the Lands Officer should investigate the circumstances and prepare a report containing his or her recommendation. The Lands Officer should forward this report to the approving authority, and send a copy to the First Nation council.
- 4.5 **Transfer within Extension Period.** Where a transfer under subsection 25(1) falls within the specified extension period, the transfer is done in the same manner as a transfer under section 24 of the *Indian Act* (See Directive 3-4). The transfer document should, however, contain the following recital:

WHEREAS (*name and number of member*) became ineligible to reside on the (*name of reserve*) on or about the (*date*);

AND WHEREAS an extension was granted in order to transfer the subject property pursuant to the provisions of subsection 25(1) to the (*termination date in Minister's consent to extension*);

- 4.6 **Reversion to First Nation.** Following the expiration of the initial six month period or any authorized extension of that period, if the ineligible individual has not transferred his or her interest in accordance with subsection 25(1), the possessory rights of the individual terminate and revert by operation of law to the First Nation. This reversion is subject to the payment of compensation to the ineligible individual for the value of any improvements to the land by the individual. In practice, a transfer or Ministerial Order is evidence of the reversion of a right to possession.
- 4.7 **Compensation for Improvements where Agreement Reached.** Usually, the amount of compensation payable to the individual is determined by mutual agreement between the First Nation council and the individual.

- 4.8 **Compensation for Improvements where No Agreement Reached.** Where the council and the individual cannot agree, the Minister must exercise his discretionary powers pursuant to subsection 25(2) of the Indian Act. A comprehensive investigation is conducted as soon as possible to identify the improvements to the subject property. The report on this investigation, in conjunction with Public Works and Government Services Canada (PWGSC), should include:
- a) identification of the improvements and confirmation of ownership;
  - b) the value of the improvements, determined either by independent appraisal where possible, or by a mutually acceptable sum agreed upon by the individual and the First Nation council; and
  - c) basis for the dispute with recommendations for its resolution.
- 4.9 **Documentation.** The documents required to prove the reversion of the individual's rights to the First Nation will depend upon the circumstances surrounding the reversion.
- a) **Transfer.** Where the individual and First Nation council have agreed on the compensation for permanent improvements, a transfer is completed as set out in Directive 3-4.
  - b) **Ministerial Order.** Where they reach no agreement, the matter is resolved by Ministerial Order.

## 5. Process

- 5.1 This section provides an overview of how to do a reversion of the right to possession under section 25 of the *Indian Act*. We include a detailed checklist as Annex A to this Directive. Please note that First Nations exercising delegated authorities under section 60 of the *Indian Act* are responsible for taking the steps identified as the responsibility of **INAC Field** in the checklist. Consult delegation instruments to confirm the scope of authority.

- 5.2 **Notice.** The Lands Officer provides notice of the operation of section 25 to the individual who is ineligible to continue to reside on reserve lands and to the First Nation council. Usually the Lands Officer will become aware of the individual's ineligibility to reside on the reserve during informal discussions with First Nation members.
- 5.3 **Extensions.** The ineligible individual submits a request for an extension, accompanied by any supporting recommendation of the First Nation council, to the Lands Officer before the expiry of the six-month period specified in subsection 25(1) of the *Indian Act* .
- 5.4 The Lands Officer reviews the request and forwards it, accompanied by his or her recommendation, to the authority approving the extension for the Minister.
- 5.5 **Transfer by Individual.** Where an individual transfers his or her right to possession to a member of the First Nation or to the First Nation itself within the specified six-month period, or an authorized extension period, the transfer is completed according to section 24 of the *Indian Act* (see Directive 3-4) and the policies of this directive.
- 5.6 **Reversion where Parties Agree to Compensation.** Where a right to possession reverts to the First Nation, and the individual and First Nation council have agreed on the compensation for permanent improvements, a transfer is completed in the same manner as a transfer under section 24 of the *Indian Act* (see Directive 3-4).
- 5.7 **Reversion where Parties do not Agree to Compensation.** Where a right to possession reverts to the First Nation, and the council and the ineligible individual have not agreed on the compensation for permanent improvements, the Lands Officer requests PWGSC to prepares an investigative report on the improvements to the subject property to determine the compensation to be paid to the individual.
- 5.8 **Appraisal.** The Lands Officer arranges for an appraisal to value the permanent improvements to the land. A review by PWGSC is recommended.
- 5.9 **Verify Available Funds.** The Lands Officer checks whether adequate funds are available to the First Nation to pay appropriate compensation. Where it appears that the required First Nation funds may not be available the Lands Officer discusses the available options with the Regional Director of LTS.



- 5.10 The Lands Officer submits the investigative report, with his or her recommendations, to the authority approving the compensation to be paid to the individual. The officer also sends a copy to the First Nation council.
- 5.11 **Ministerial Order.** If a Ministerial Order (“Order”) is required, the Lands Officer, with the assistance of the Department of Justice, prepares the Order setting out the compensation to be paid to the individual for improvements to the subject property and confirming that the right to possession of the land has reverted to the First Nation. The Lands Officer sends the Order for approval and registration.
- 5.12 If the matter has been resolved by the Order, a copy of the registered Order is forwarded to the First Nation council with the advice that the subject lands are available for re-allotment.
- 5.13 **Payment of Compensation.** After the Order is issued, the First Nation council arranges for payment of compensation from First Nation funds.
- 5.14 The Lands Officer ensures that the First Nation council complies with the terms of the Order. If necessary, the Lands Officer recommends to the Regional Director of LTS possible steps to take to ensure compliance. Discussions with the Department of Justice may also be appropriate.

## 6. References

- 6.1 Besides the relevant sections of the legislation, further information may be found in the *Indian Lands Registration Manual*.



**Directive 3-5: Reversion of Right to Possession**

**Annex A: Checklist**



## Checklist Reversion of Right to Possession

1	<b>INAC Field:</b> Provides notice of options under section 25 of the <i>Indian Act</i> to First Nation council and to the individual who is ineligible to continue to reside on reserve lands.	
2	<b>Where ineligible individual arranges a transfer</b> pursuant to section 25(1) within the stipulated six-month period, completes the transfer following Directive 3-4.	
3	<b>REQUEST FOR EXTENSION</b>  <b>First Nation:</b> Before expiry of the six-month period specified in subsection 25(1), the First Nation council forwards to the Lands Officer a request for an extension, accompanied by its supporting BCR.	
4	In the alternative, before the expiry of the six-month period specified in subsection 25(1), the ineligible individual forwards to the Lands Officer a request for an extension of the period within which he or she must transfer the rights to possession.	
5	Reviews the request from the First Nation council or individual.	
6	Forwards request and his or her recommendation, to the approving authority.	
7	Request for extension granted or denied by the approving authority.	
8	Where a transfer pursuant to section 25(1) which falls within an authorized extension period is approved, completes transfer according to Directive 3-4, ensuring that the transfer document includes the proper recital.	
9	<b>REVERSION TO FIRST NATION - COMPENSATION AGREED</b>  <b>First Nation:</b> Where right to possession of the subject lands reverts to the First Nation, and the individual and First Nation have reached an agreement with respect to compensation for permanent improvements, prepares documentation for transfer of lawful possession with assistance of Lands Officer if necessary.	
10	<b>First Nation (continued):</b>  Completes transfer of interest in land in accordance with Directive 3-4	

11	<b>INAC Field:</b> Where right to possession of the subject lands reverts to the First Nation, and the individual and First Nation have reached an agreement with respect to compensation for permanent improvements, provides assistance to First Nation in preparation of transfer documents, when required.	
12	Completes transfer of interest in land in accordance with Directive 3-4.	
13	<b>REVERSION TO FIRST NATION - COMPENSATION NOT AGREED</b>  <b>INAC Field:</b> Where right to possession of the subject lands reverts to the First Nation, and the individual and First Nation have not reached an agreement with respect to compensation for permanent improvements, prepares an investigative report including:  a) identification of improvements and confirmation of ownership; b) value of the improvements determined by appraisal or agreement; c) availability of First Nation funds; d) basis for the dispute with recommendations for its resolution.	
14	Submits investigative report, with his or her recommendations, to the authority approving the compensation for permanent improvements to be paid to the individual, and sends a copy to the First Nation council.	
15	<b>First Nation:</b> Where the First Nation council and individual <b>agree with the valuation</b> , passes a BCR indicating concurrence with the valuation and recommending payment of compensation from First Nation funds.	
16	<b>INAC Field:</b> If the First Nation council and individual <b>do not agree with the valuation</b> , prepares Ministerial Order and forwards for approval.	
17	Forwards a copy of the order to the First Nation council, advising that the subject lands are available for re-allotment.	
18	<b>First Nation:</b> Arranges for payment of compensation to the individual from First Nation funds.	
19	<b>INAC Field</b> Where payment of compensation is pursuant to a Ministerial Order, ensures that the First Nation council complies with the terms of the Order.	

## Directive 3-6

# Correcting and Cancelling Certificates of Possession, Certificates of Occupation or Location Tickets

### 1. Purpose

- 1.1 This directive explains how to cancel Certificates of Possession, Certificates of Occupation or Location Tickets pursuant to section 26 or cancel them pursuant to section 27 of the *Indian Act*. You should read this directive for information on:
- a) **Policy:** It states the principles and requirements governing the correction or cancellation of a CP, a CO, or a LT.
  - b) **Procedures:** It outlines the steps to be taken to correct or cancel a CO, a CP, or a LT.

### 2. General

- 2.1 Section 26 of the *Indian Act* provides for the correction of a Certificate of Possession (CP), a Certificate of Occupation (CO) or a Location Ticket (LT) where the Minister believes that:
- a) through mistake, the CP, CO or LT has been issued to or in the name of the wrong person;
  - b) the CP, CO or LT contains any clerical error or misnomer; or,
  - c) the CP, CO or LT contains a wrong description of any material fact therein.
- 2.2 In the above circumstances, the Minister may cancel the CP, CO or LT and issue a corrected Certificate in its place.
- 2.3 Unlike section 26, which contemplates that after a CP, CO or LT has been cancelled a revised or amended CP will be issued, the sole discretion vested in the Minister by virtue of section 27 is to cancel the offending CP, CO or LT.

- 2.4 Under section 27, the Minister may cancel a CP, CO or a LT, with the consent of the holder, where:
- a) through mistake, the CP, CO or LT has been issued to or in the name of the wrong person;
  - b) the CP, CO or LT contains any clerical error or misnomer;
  - d) the CP, CO or LT contains a wrong description of any material fact therein.
- 2.5 The Minister may cancel an individual's lawful possession of reserve land including a CP, CO, Cardex, NE, NETI, or a LT without the consent of the holder where the Minister believes it was issued through fraud or error.

### 3. Authorities

#### 3.1 Relevant statutory authorities include:

*Indian Act*, ss. 26 and 27

*26. Whenever a Certificate of Possession or Occupation or a Location Ticket issued under The Indian Act, 1880, or any statute relating to the same subject-matter was, in the opinion of the Minister, issued to or in the name of the wrong person, through mistake, or contains any clerical error or misnomer or wrong description of any material fact therein, the Minister may cancel the Certificate or Location Ticket and issue a corrected Certificate in lieu thereof.*

*27. The Minister may, with the consent of the holder thereof, cancel any Certificate of Possession or Occupation or Location Ticket referred to in section 26, and may cancel any Certificate of Possession or Occupation or Location Ticket that in his opinion was issued through fraud or in error.*

### 4. Policy

- 4.1 **Notice.** The individual(s) or the First Nation may request corrective action under section 26 or 27, or the department may initiate the correction. Whenever corrective action is initiated, the Lands Officer should give notice to both the individual(s) and the First Nation council.
- 4.2 Section 26 of the *Indian Act* is a remedial section intended to allow correction where a CP, CO or LT has been issued incorrectly through "clerical" error or misdescription. This section of the *Indian Act*, therefore, should not be used where there is a dispute between the parties unless it is clearly justified and the Department of Justice has approved the action.



- 4.3 **Amended BCR.** Where the parties agree that a CP, CO or LT has been issued based on wrong information in a First Nation council Resolution (BCR), the Department requires an amended BCR before undertaking corrective action.
- 4.4 **Fraud or Error.** Although the provisions of section 27 are seldom used, where circumstances show that a CP, CO, or LT has been issued through fraud or in error, the Lands Officer should consult with the Department of Justice, the First Nation council, and where appropriate, the individual(s) concerned, prior to undertaking corrective action pursuant to this section.
- 4.5 Where the Department of Justice has recommended that the CP, CO, or LT should not be cancelled, or where Justice is unable to determine whether the CP, CO, or LT should be cancelled, the Lands Officer should advise the parties to the dispute that if they are unable to settle the issue between themselves, their remedy lies with the courts.
- 4.6 Where, in consultation with the Department of Justice, the Department determines that a CP, CO, or LT has been issued through fraud or in error, and the First Nation council agrees with the determination, the Lands Officer should obtain a BCR from the First Nation council providing the required information.
- 4.7 Where the First Nation council does not provide a BCR because it does not agree that a CP, CO or LT has been issued through fraud or error, but such is the determination of the Department of Justice, the Lands Officer requests the corrective action and the Indian Lands Registry executes the correction through a Ministerial order.

## 5. Process

- 5.1 This section provides an overview of how to correct or cancel Certificates of Possession, or Occupation or LT's under section 26 or section 27 of the *Indian Act*. We include a detailed checklist in Annex A to this Directive. Note that First Nations exercising delegated authorities under section 60 of the Indian Act are responsible for taking the steps identified as the responsibility of **INAC Field** in the checklist. You should consult delegation instruments to confirm the scope of authority.
- 5.2 **Review.** The Lands Officer reviews the circumstances to decide whether correction or cancellation of the CP, CO, or LT is the appropriate action. This would usually occur at the request of the First Nation council or an individual member.

- 5.3 **Notice.** Where corrective action is being considered under section 26 or 27, the Lands Officer must provide notice to the affected parties in the form of a fact letter. This letter should set out the circumstances of the error and the action that will be taken to correct it. It should provide the affected parties with at least (30) days to provide alternative facts or germane objections to the corrective action.
- 5.4 **BCR/Transfer Correct.** Where a BCR or transfer is correct, but the issued CP, CO, or LT contains an error, the Lands Officer notifies the Indian Lands Registry of the mistake and requests a correction.
- 5.5 Upon receiving a request for correction, the Indian Lands Registry reviews the request. Where it agrees with the proposed action, the Registry draws up a Ministerial Order which cancels the old interest and CP, CO or LT, and issues a new CP or CO.
- 5.6 The Order is executed for the Minister and is registered. The incorrect CP, CO or LT is then cancelled and a new CP or CO is issued. However, in situations where a CP, CO or LT is cancelled, and a new CP or CO is to be issued, a survey may need to be completed prior to the issuance of a new CP.
- 5.7 **BCR Incorrect - Parties Agree.** Where the CP, CO or LT is incorrect due to an error in the BCR and the First Nation council and individual(s) agree that the documentation contains a mistake, the individual receiving the allotment executes a transfer back to the First Nation. This transfer is then processed following Directive 3-4.
- 5.8 Once the transfer is complete, the First Nation council passes a new BCR, correctly allotting the subject property.
- 5.9 After passing the BCR, the First Nation council submits it to the Lands Officer for review. The allotment is then completed following Directive 3-2.
- 5.10 **Transfer Incorrect - Parties Agree.** Where a CP, CO or LT is incorrect due to an error in a transfer, and all parties agree that the documentation contains a mistake, a new transfer is prepared and executed. This transfer is then processed following Directive 3-4.
- 5.11 **BCR/Transfer Incorrect - Parties Disagree.** Where a CP, CO or LT is in error because the BCR or transfer is incorrect and the First Nation council and/or individual(s) do not agree that there is a mistake in the documentation, the Lands Officer should consult with the Department of Justice. Where appropriate, the Lands Officer should also consult with the First Nation council and the individual(s).

- 5.12 Where, after consultation, the Department of Justice determines that the CP, CO or LT should not be cancelled and reissued, or where Justice is unable to determine whether the CP, CO or LT should be cancelled, the Lands Officer informs the parties of this decision. At that point the matter is a private dispute between the parties. The Lands Officer should advise the parties to the dispute that if they are unable to settle the issue between themselves, their remedy lies with the courts.
- 5.13 Where, after consultation, the Department of Justice agrees that the CP, CO or LT should be cancelled, the Lands Officer forwards to the Indian Lands Registry a request for correction of a CP, CO or LT along with any supporting documentation.
- 5.14 Upon receipt and review of the request, where the Indian Lands Registry agrees that cancelling the CP, CO or LT is appropriate, the Registry prepares a Ministerial Order which cancels the allotment or transfer and the CP, CO or LT and orders the issuance of a CP or CO.
- 5.15 After the order is prepared, it is signed for the Minister and registered. The old interest and CP, CO or LT is cancelled and a new CP or CO is issued.
- 5.16 **Cancellation of a CP or CO or LT under Section 27.** To cancel a CP, CO, or LT, with the consent of the holder, pursuant to section 27, follow the steps outlined in paragraphs 5.1 to 5.9, with the following modifications:
- a) Where an interest and CP, CO or LT are cancelled according to paragraphs 5.8 and 5.9, no corrected CP is issued.
  - b) Once the transfer back to the First Nation is completed in paragraph 21 5.10, we take no further steps.
- 5.17 **Fraud or Error.** In all cases where it appears the CP, CO or LT was issued through fraud or in error, the Lands Officer consults with the Department of Justice before requesting cancellation of the CP, CO, or LT.

## 6. References

- 6.1 For more information you should read the *Indian Lands Registration Manual*.



**Directive 3-6: Correcting and Cancelling Certificates  
of Possession, Certificates of Occupation or Location Tickets**

**Annex A: Checklist**



## Correcting and Cancelling Certificates of Possession and Occupation

1	<b>First Nation:</b> First Nation or individual requests corrective action under section 26 or 27 of the Indian Act.	
2	<b>INAC Field:</b> Responds to request of First Nation or individual, or commences corrective action at the initiative of the department.	
3	Provides notice of corrective action to the individual(s) and First Nation Council.	
4	<b>If BCR/TRANSFER CORRECT or</b> Where BCR or transfer is correct, but Certificate or Location Ticket is in error, notifies <b>ILR</b> of mistake and requests correction.	
5	<b>INAC H.Q.</b> Reviews request.	
6	If agrees with proposed action, drafts and submits Ministerial Order for approval.	
7	Registers Ministerial Order following the <i>Indian Lands Registration Manual</i> .	
8	Cancels incorrect Certificate or Location Ticket and, where applicable, issues new Certificate.	
9	<b>If BCR/TRANSFER INCORRECT - Parties AGREE</b>  <b>First Nation</b> Where BCR incorrect and parties agree the documentation contains an error, individual executes transfer conveying subject land back to First Nation and forwards to Lands Officer (see Directive 3-4).	

	<b>If BCR/TRANSFER INCORRECT - Parties AGREE (continued)</b>	
10	<b>INAC Field</b> Reviews transfer and forwards it, along with supporting documentation for approval. Once approved, forwards transfer to Indian Lands Registry for Registration (see Directive 3-4).	
11	<b>First Nation</b> Where applicable, passes new BCR correctly allotting subject lands and forwards to Lands Officer for approval (see Directive 3-2).	
12	<b>INAC Field</b> Reviews new B.C.R and supporting documentation, forwards it for approval and subsequently for registration (see Directive 3-2).	
13	<b>INAC H.Q.</b> Registers new BCR and issues Certificate (see Directive 3-2).	
	<b>If TRANSFER INCORRECT - PARTIES AGREE or</b>	
14	<b>First Nation</b> Where transfer incorrect and parties agree the documentation contains an error, a new transfer is executed correctly conveying the subject lands. The transfer and supporting documentation are then forwarded to the Lands Officer (see Directive 3-4).	
15	<b>INAC Field</b> Reviews transfer and forwards it, along with supporting documentation, for approval. Once approved, forwards transfer to Indian Lands Registry for Registration (see Directive 3-4).	
16	<b>INAC H.Q.</b> Registers transfer and, where applicable, issues Certificate (see Directive 3-4).	
	<b>If B.C.R/TRANSFER INCORRECT-PARTIES DISAGREE or FRAUD/ERROR</b>	
17	<b>INAC Field</b> Where BCR or transfer incorrect and parties do not agree the documentation contains an error, or where it appears Certificate or Location Ticket issued through fraud or in error, reviews circumstances in consultation with Department of Justice, and where appropriate, the parties.	



18	<b>INAC Field</b> After consultation with Department of Justice, forwards request for corrective action or cancellation to Indian Lands Registry or informs parties no corrective action to be taken.	
19	<b>INAC H.Q.</b> Reviews request.	
20	Where in agreement with proposed action, drafts and approves Ministerial Order.	
21	Registers Ministerial Order in accordance with the <i>Indian Lands Registration Manual</i> .	
22	If applicable, issues new CP or CO.	

# Directive 3-7

## Compensation for Improvements

### 1. Purpose

- 1.1 This directive explains how to use section 23 of the *Indian Act*, which provides payment to a locatee to compensate for permanent improvements made to reserve lands, where the locatee is lawfully removed from those lands. You should read this directive for information on:
- a) **Policy:** It states the principles and requirements governing the compensation of a First Nation member in the circumstances set out in section 23.
  - b) **Procedures:** It outlines the steps to take to set and pay compensation.

### 2. General

- 2.1 Section 23 of the *Indian Act* provides for compensation to a First Nation member for permanent improvements made on reserve lands from which the individual has been lawfully removed.
- 2.2 In those circumstances, the First Nation member may be compensated, at the discretion of the Minister, for the value of those improvements, either from the funds of the First Nation or from the individual who goes into possession.

### 3. Authorities

#### 3.1 Relevant statutory authorities include:

*Indian Act*, s. 23

*23. An Indian who is lawfully removed from lands in a reserve upon which he has made permanent improvements may, if the Minister so directs, be paid compensation in respect thereof in an amount to be determined by the Minister, either from the person who goes into possession or from the funds of the band, at the discretion of the Minister.*

## 4. Policy

- 4.1 **Investigation.** Where a potential case of removal from reserve lands comes to the attention of a Lands Officer, the officer should investigate it as soon as possible. The Lands Officer should not delay an investigation of the underlying circumstances because litigation has been commenced between a First Nation council and an individual member concerning removal from reserve lands.
- 4.2 Because the department does not administer traditional or custom land holdings or occupational rights at the pleasure of the First Nation, the Lands Officer should refer disputes involving this type of tenure to the First Nation council.
- 4.3 **Litigation.** It is the Minister who must make the various determinations under section 23 of the *Indian Act*. The Department does not take notice of litigation proceedings before the judgement is rendered. To do so would abdicate the discretionary powers of the Minister to the court system. Likewise, although the Minister has no authority to preclude the parties from commencing litigation, it should not be encouraged as a means of determining the rights between the various parties involved in a dispute concerning compensation for improvements.
- 4.4 **Settlement by Mutual Agreement.** The First Nation council and the individual member should have a reasonable opportunity to settle the matter of compensation by mutual agreement.
- 4.5 The department should offer assistance by providing services such as determining the value of improvements.
- 4.6 If a settlement seems unlikely, the Lands Officer should advise the First Nation council and individual member that the Minister may exercise his discretionary powers.

## 5. Process

- 5.1 This section provides an overview of the process where, pursuant to section 23 of the *Indian Act*, a First Nation member may be entitled to compensation for permanent improvements made to reserve lands where the First Nation member is subsequently lawfully removed from those lands. We include a detailed checklist at the end of this directive. In summary, the process involves the following major steps:
- a) **Investigation of Removal from Reserve Lands.** When reported to a Lands Officer, he or she investigates potential cases of removal.
  - b) **Facilitate Settlement between First Nation and Individual.** The Lands Officer offers Departmental services to assist in settlement.

## Process (continued)

- c) **Exercise of Discretion.** Where settlement is unlikely, the Lands Officer advises the parties to the dispute that the Minister may exercise his powers.
- d) **Appraisal.** An appraisal should value the permanent improvements to the land. A review by Public Works and Government Services Canada is recommended.
- e) **Verify Available Funds.** If applicable, check whether adequate funds are available to the First Nation to pay appropriate compensation.
- f) **Ministerial Order.** If a Ministerial Order is required, the Lands Officer, with the assistance of the Department of Justice, prepares the order setting the compensation payable to the individual being removed for improvements to the subject property, and identifying the source of the compensation (i.e. First Nation funds or those of the individual going into possession). The Lands Officer forwards the Order for approval.
- g) **Payment of Compensation.** Upon issuance of the Order, the Lands Officer arranges to pay compensation from First Nation moneys, if applicable.
- h) If the matter has been resolved by Ministerial Order, a copy of the order is forwarded to the First Nation council, the individual being removed, and where affected by the order, the individual(s) going into possession.

## 6. References

- 6.1 For more information you should read the *Indian Lands Registration Manual*.

**Directive 3-7: Compensation for Improvements**

**Annex A: Checklist**



## Compensation for Improvements

1	<p><b>First Nation:</b> Negotiates with individual in occupation about compensation for improvements to the subject land.</p>	
2	<p><b>INAC Field:</b> Eases settlement between First Nation and individual by offering departmental assistance.</p>	
3	<p>Where no settlement, prepares an investigative report including:</p> <ul style="list-style-type: none"> <li>a) identification of improvements and confirmation of ownership;</li> <li>b) value of the improvements determined by appraisal or agreement;</li> <li>c) availability of First Nation funds.</li> </ul>	
4	<p>Submits an investigative report, with his or her recommendations, to the authority approving the compensation for permanent improvements payable to the individual being removed, and sends a copy to the First Nation council, and where applicable, the individual(s) going into possession.</p>	
5	<p>Consult with Regional Justice about the proposed order.</p>	
6	<p>Where compensation issue settled by Ministerial Order, prepares order and submits for approval.</p>	
7	<p>Forwards copy of Ministerial Order to First Nation, the individual being removed and where applicable, the individual(s) going into possession.</p>	
8	<p><b>First Nation:</b> Arranges compensation payment from First Nation funds to the individual being removed, if applicable.</p>	
9	<p><b>INAC Field:</b> Where payment of compensation is pursuant to a Ministerial Order, ensures compliance with the terms of the Order.</p>	

## Directive 3-8 Band Mortgages

### 1. Purpose

- 1.1 This directive provides an option for First Nations lending to First Nation members on reserve lands, and it should be noted that with any agreement between parties there are risks. Consequently, the Lands Officer should caution both the Mortgagor and Mortgagee that this is only an option and that they should seek independent legal advice before entering into this kind of agreement or another viable option.
- 1.2 This directive summarizes the procedures to follow in case of default of a First Nation member mortgage using the sample attached at Annex "A".

### 1.3 Definitions

- a) **Mortgage:** an interest in land created by a written instrument or consent as defined in the directive on the Approval and Management of Ministerial Loan Guarantees for Housing, where the Mortgagor (a member of the First Nation) gives his/her lawful possession of Indian reserve land as security for a loan of money.
- b) **Mortgagee:** to loan money to a First Nation council or a registered First Nation member that agrees to loan "lends" money to another registered First Nation member (Mortgagor) in exchange for the pledge of the lawful possession of the Mortgagor.
- c) **Mortgagor:** a registered First Nation member that enters in "to" a mortgage agreement with a First Nation council or a registered First Nation member (Mortgagee) in order to borrow money from the Mortgagee.
- d) **Quit Claim:** a written document used by the Mortgagor to transfer his/her lawful possession of Indian reserve land to the Mortgagee (here the First Nation or a registered First Nation member).



- e) **Power of sale:** an action taken by the Mortgagee to sell the lawful possession of the mortgaged property to a purchaser, free and clear of the interest of the Mortgagor or any other person having an interest subsequent to the Mortgage.
- f) **Purchaser:** a registered member of the First Nation that acquires, by purchase, the lawful possession of the mortgaged property.
- g) **Foreclosure:** an action before the Court where the mortgagee asks the Court that he becomes the owner of the mortgaged property.
- h) **Statement of Claim:** the document beginning the action in Court.
- i) **Statement of Defense:** the document which answers the Statement of Claim.

## 2. General

- 2.1 According to subsection 89(1) of the *Indian Act*, a First Nation member in lawful possession of reserve land can enter into a mortgage agreement with a First Nation Council or a First Nation member using his lawful possession of Indian reserve land as security to obtain a loan.
- 2.2 If the First Nation member (Mortgagor) defaults in carrying out his obligation under the mortgage, the Mortgagee may undertake to carry out one of the following remedies: obtain a quit claim, file for foreclosure or begin power of sale proceedings.

## 3. Authorities

- 3.1 Relevant statutory authorities include:

*Indian Act*, s. 24 and ss. 89(1):

*24. An Indian who is lawfully in possession of lands in a reserve may transfer to the band or another member of the band the right to possession of the land, but no transfer or agreement for the transfer of the right to possession of lands in a reserve is effective until it is approved by the Minister.*

*89(1). Subject to this Act, the real and personal property of an Indian or a band situated on a reserve is not subject to charge, pledge, mortgage, attachment, levy, seizure, distress or execution in favour or at the instance of any person other than an Indian or a band.*

#### **4. Policy - General**

- 4.1 The Department of Indian Affairs and Northern Development (INAC) will not get involved in the drafting of a mortgage between the Mortgagee and the Mortgagor. However, if INAC is consulted by a First Nation, INAC representatives can provide samples of standard mortgage default remedy clauses such as the ones included in Annex "A", for the information of the First Nation. It is up to the First Nation to determine the provisions of the mortgage document.
- 4.2 The mortgage document should be registered in the Indian Land Registry (ILR) in accordance with its rules and guidelines.
- 4.3 Upon default of the Mortgagor, the Mortgagee has three options to obtain lawful possession or to recoup his loss. These options are:
- a) a quit claim deed signed by the Mortgagor and obtained after default;
  - b) a foreclosure action;
  - c) a power of sale.
- 4.4 Any transfer of a right to possession of the mortgaged property can only be made to the First Nation or a registered member of that First Nation in accordance with the *Indian Act*.

#### **5. Policy - Quit Claim Deed**

- 5.1 A quit claim deed must be obtained and signed after the default of the Mortgagor and it must be registered in the ILR in accordance with its requirements.

- 5.2 The following should be included in the quit claim document:
- a) a reference to the registered mortgage in default, such as its registration number, and the date it was executed;
  - b) the name and number of the First Nation member (the Mortgagor) as shown in the Indian Registry System;
  - c) the most current legal description of the mortgaged land;
  - d) an affidavit of witness.
- 5.3 The quit claim deed, in order to be registered, must be approved in accordance with section 24 of the *Indian Act*.

## **6. Policy - Foreclosure**

- 6.1 An action of foreclosure may commence immediately upon default by the mortgagor of a payment of principal and/or interest.
- 6.2 An action of foreclosure must begin with a Statement of Claim that must be served to the following persons:
- a) the lawful possessor of the property;
  - b) the lawful possessor's spouse including common law spouse;
  - c) the original Mortgagor and the guarantor where applicable;
  - d) every person having a registered interest in the property subsequent to the mortgage;
  - e) any person having an unregistered interest in the property subsequent to the mortgage and of which the Mortgagee has been notified.
- 6.3 The Statement of Claim should be registered in the ILR to notify interested parties and to protect the interest of the Mortgagee.

- 6.4 Upon receiving the statement of claim, the Mortgagor has several options which are:
- a) putting the mortgage in good standing which means making the payments that were not paid in time;
  - b) paying the mortgage debt in full;
  - c) serving and filing with the Court a Statement of Defense;
  - d) filing with the Court a request to redeem;
  - e) filing with the Court a request for sale.
- 6.5 Following the option chosen by the Mortgagor, the Mortgagee should send to INAC:
- a) a discharge of mortgage if the debt has been paid in full;
  - b) a notice stating that the mortgage is in good standing if the Mortgagor makes the payments due to the Mortgagee; or
  - c) an order from the Court foreclosing the mortgage interest, or converting the procedure to a power of sale.
- 6.6 If a final order of foreclosure is issued by the Court, the Mortgagee should submit the order to INAC for approval under section 24 of the *Indian Act*. A discharge of mortgage document should be submitted at the same time.

## 7. Policy - Power of Sale

- 7.1 Before executing the power of sale the Mortgagee must give notice.
- 7.2 The notice must be given 15 days or more after the default occurred.
- 7.3 The notice should be registered in the ILR.
- 7.4 The notice must contain the following:
- a) the date of the mortgage;
  - b) the registration number of the mortgage;
  - c) the name and registration number, as shown in the Indian Registry System, of the First Nation member receiving the interest in the land;
  - d) the most current legal land description of the mortgaged land.

- 7.5 The notice must be served to the following persons:
- a) the lawful possessor(s) of the property;
  - b) the lawful possessor's spouse including common law spouse;
  - c) the original Mortgagor and the guarantor where applicable;
  - d) every person having a registered interest in the property subsequent to the mortgage. The Mortgagee should check the ILR for any registered interests in the mortgaged property;
  - e) any person having an unregistered interest in the property subsequent to the mortgage **and of which the Mortgagee has been notified.**
- 7.6 The notice should set out the nature of the default, and the amount required for principal, interest and any costs the Mortgagee is entitled to claim under the mortgage agreement such as legal fees or costs to serve the notice. It should also notify the Mortgagor of the date when the amount is required.
- 7.7 The notice should be accompanied by a statutory declaration attesting that the notice was served as required above, as well as how it was served.
- 7.8 The sale or the transfer to the First Nation or First Nation member can occur only 35 days or more after the notice has been given. This term can be longer if the mortgage document provides for a longer period of time.
- 7.9 When the sale is completed, a discharge of mortgage and a First Nation Council Resolution (BCR) explaining that the mortgage is in default, what procedure has been followed, and requesting the transfer of the lawful possession, should be sent by the First Nation council to INAC, for approval.
- 7.10 The BCR described above must also contain the following:
- a) the date of the mortgage and the number under which the mortgage is registered in the ILR;
  - b) the most current legal description of the property;
  - c) the registration number of the notice and statutory declarations;
  - d) name and Band number, as shown in the Indian Registration System, of the First Nation member who is purchasing the property and;
  - e) a request for the approval of the transfer of lawful possession pursuant to section 24 of the *Indian Act*.

- 7.11 INAC will accept and register, subject to ministerial approval under section 24 of the *Indian Act*, a transfer signed by the Mortgagor in favor of the First Nation and executed before the mortgage default, provided that the First Nation has completed all of the steps set on in sections 7.1 to 7.9 and 7.13 to 7.15 inclusive.
- 7.12 If the First Nation has a Transfer of Land transferring lawful possession of the land to the First Nation, it should submit a discharge of mortgage with the Transfer. If a discharge of mortgage is not provided at this time, it must be provided for registration before lawful possession of the land can be re-allotted in the future.
- 7.13 The BCR or the transfer under section 24 of the *Indian Act* should be accompanied by a statutory declaration attesting that the default of the mortgage continued up to the date of sale and that the Mortgagee has complied with the law in completing the power of sale proceedings.

## **8. Process**

- 8.1 If a Lands Officer is consulted by a First Nation on the drafting of a mortgage document, he can provide the sample default remedy clauses included in this policy as Annex "A". The Lands Officer should also advise the First Nation to obtain independent legal advice, as it is up to the First Nation to determine the content and legal effect of its mortgage document.
- 8.2 Once the mortgage document is finalized and signed by the parties, the Mortgagee should submit the document to INAC for registration.

## **9. Process - Quit Claim**

- 9.1 Except for 53/60 First Nations, the Mortgagee should send the quit claim deed to the regional or district office of INAC.
- 9.2 Upon receiving a quit claim deed, the Lands Officer should verify that it meets the requirements of this policy.

- 9.3 The Lands Officer should ensure that the quit claim was signed after the default has occurred.
- 9.4 The Lands Officer should also ensure that reference is made to:
- a) the date and the registration number of the mortgage in default;
  - b) the name and number of the Mortgagor as shown in the Indian Registry System; and
  - c) the most current legal land description of the mortgaged land.
- 9.5 The Lands Officer should verify that an affidavit of witness is attached to the Quit Claim deed.
- 9.6 If the Quit Claim meets all requirements, the Lands Officer will forward the document for approval under section 24 of the *Indian Act* to the person who has delegated authority to approve such a transaction.
- 9.7 Once approved, the document will be submitted to the ILR for registration.

## 10. Process - Foreclosure

- 10.1 If an action of foreclosure is commenced, the Mortgagee should forward a copy of the Statement of Claim to the ILR for registration.
- 10.2 If the Mortgagor chooses to pay his debt or put the Mortgage in good standing, the Mortgagee should send to the ILR a discharge of Mortgage or a notice advising the ILR that the mortgage is in good standing.
- 10.3 Except for 53/60 First Nations, whenever a final order of foreclosure is given by the Court, the Mortgagee should send a certified copy of the Order to the regional or district office of INAC.
- 10.4 Upon receiving an order of foreclosure, the Lands Officer will verify that it meets the ILR requirements for registration and that a Statement of Claim and a notice in good standing were registered.
- 10.5 The Lands Officer will also verify that the Court order refers to the mortgage agreement that was registered and that it orders the transfer of lawful possession of the reserve land to the Mortgagee.

- 10.6 If it meets the requirements, the Lands Officer will forward the Court order for approval under section 24 of the *Indian Act* to the person in INAC who has delegated authority to approve the document.
- 10.7 Once the document is approved, the Lands Officer will forward it to the ILR for registration.

## 11. Process - Power of Sale

- 11.1 If a power of sale procedure is chosen by the Mortgagee to recoup his/her loss, he/she has to serve a notice.
- 11.2 The Mortgagee should conduct a search of title of the mortgaged property to determine the interested parties that should receive a notice in accordance with section 7.5 of this policy.
- 11.3 The notice should be forwarded for registration to INAC by the Mortgagee along with the required Statutory Declaration regarding service of the Notice of Sale.
- 11.4 The Indian Lands Registry (ILR) Officer will verify that the notice meets the requirements of the ILR and then she/he will register the document.
- 11.5 If a sale is completed, the First Nation council should send a BCR along with the required statutory declaration and a discharge of mortgage to INAC regional or district office for ministerial approval and registration.
- 11.6 If a transfer of land under section 24 of the *Indian Act* was executed by the Mortgagor, the First Nation council should send the transfer for approval along with the required statutory declaration and the discharge of mortgage if applicable.
- 11.7 The Lands Officer will verify that the BCR or the transfer of land under section 24 of the *Indian Act* and the discharge of mortgage, if applicable, meet the requirements of this directive and of the ILR policy.
- 11.8 If the BCR or the section 24 transfer meets the requirements, the Lands Officer will forward it to the person in INAC who has delegated authority to approve the document under section 24 of the *Indian Act*.



- 11.9 Once the BCR or the transfer is approved, the Lands Officer will send the BCR or the transfer with the discharge of mortgage if applicable to the ILR for registration.
- 11.10 The ILR Officer will verify and register the BCR or the transfer under section 24 and the discharge of mortgage in accordance with the ILR requirements.

## **12. Implementation**

- 12.1 This directive will come into force upon distribution.

## **13. References**

- a) Indian Lands Registration Manual
- b) Land Management Manual
- c) *Indian Act*

STEPS IN THE QUIT CLAIM PROCESS	Organizations involved				
	FN Council	Mortgagor	Mortgagee	INAC Field	INAC H.Q.
1- Send the quit claim to INAC.			<b>U</b>		
2- Verify that the quit claim meets the ILR.				<b>U</b>	
3- Forward the quit claim for approval.				<b>U</b>	
4- Submit the quit claim for registration.				<b>U</b>	
5- Registration.					<b>U</b>

STEPS IN THE FORECLOSURE PROCESS	Organisations involved				
	FN Council	Mortgagor	Mortgagee	INAC Field	INAC H.Q.
1- File a statement of claim.			<b>U</b>		
2- Serve the statement of claim.			<b>U</b>		
3- Forward the statement of claim for registration.			<b>U</b>		
4- Verify and register the statement of claim.					<b>U</b>

STEPS IN THE FORECLOSURE PROCESS	Organization Involved				
	First Nation	Mortgagor	Mortgagee	INAC Field	INAC H.Q.
5- Decision of the mortgagor to file a statement of defence, pay the debt or put the mortgage in good standing.		<b>U</b>			
6- Send the appropriate document to INAC (ie: notice, discharge or Court order).			<b>U</b>		
7-Registration				<b>U</b>	

STEPS IN THE POWER OF SALE PROCESS	Organization Involved				
	First Nation	Mortgagor	Mortgagee	INAC Field	INAC H.Q.
1- Conduct a title search			<b>U</b>		
2- Serve a notice (15 days or more after default)			<b>U</b>		
3- Forward notice to ILR (with statutory declaration)			<b>U</b>		

STEPS IN THE POWER OF SALE PROCESS	Organization Involved				
	First Nation	Mortgagor	Mortgagee	INAC Field	INAC H.Q.
4- Sale (35 days or more after the notice has been served)			<b>U</b>		
5- If sale is completed, send a BCR for approval with statutory declaration and a discharge of mortgage to INAC. If a transfer of land was executed by the Mortgagor, send the transfer to INAC for approval along with the statutory declaration and a discharge of mortgage if applicable.	<b>U</b>				
6- Verify that the BCR or the transfer and the discharge of mortgage if applicable, meet the Indian Land Registry requirements.				<b>U</b>	
7- Forward BCR or transfer for approval.				<b>U</b>	
8- Forward BCR or transfer with the discharge of mortgage if applicable, and the statutory declaration to the ILR for registration.				<b>U</b>	

## **Annex “A”**

### **Sample Mortgage Default Remedy Clauses**

**NOTE:** It is recommended that the First Nation obtain independent legal advice in the drafting of any mortgage agreement in order to ensure that the appropriate enforcement mechanisms are provided in the mortgage to suit the particular circumstances, requirements and needs of the First Nation.

#### **Sample #1:**

#### **ENFORCING OUR RIGHTS**

##### **A. Default in Payment**

If you default in making any regular monthly loan payment or any other payment that you are obliged to make to us under the mortgage, we may enforce any one or more of the following remedies in any order and without prejudicing our right to exercise any other remedy we may have:

**1. Sue you**

We may take such action as is necessary to obtain payment of the loan amount.

**2. Foreclose on or sell your property**

We may commence court proceedings to foreclose your right, title and equity of redemption to all or part of your property. If we obtain a final order of foreclosure, your property will by law become our property. We may also ask the court to order the sale of your property. If the court makes such an order it will supervise the sale proceedings. The net proceeds of the sale will be applied to reduce the loan amount. Any balance remaining after all claims have been satisfied will be paid to you. If the amount we receive from the sale of your property is less than the loan amount, you must pay us the difference.

**Default in Payment (continued)****3. Power of sale**

If you default in making any payment for 15 days, we can on 35 days notice to you enter on your property and:

- a) Take possession of it;
- b) Sell all or part of your property (for cash or on credit, or partly for cash and partly on credit) by private sale or public auction for the price and on those terms that can be obtained;
- c) Lease it on such terms and for whatever period we may decide upon; or
- d) Take any other remedy available to us under law. Notice shall be given to you and to such other persons in the manner and as required by law at the time it is given. Where there are no such requirements, notice may be given to you, at our option, by one or more of the following means:
  - i) Personal service at your last known address;
  - ii) Registered mail at your last known address;
  - iii) Publication in a local newspaper;
  - iv) Leaving it with an adult person on your property; or
  - v) Posting it on your property.

If default continues for three months, we may enter on, sell or lease your property without any notice unless notice is required by law. We may apply the net proceeds of the sale or lease to reduce any part of the loan amount. Any balance remaining after all claims have been satisfied will be paid to you. If the amount we receive from the sale or lease of your property is less than the loan amount, you must pay us the difference.

**B. Default in your obligations including default in payment**

If you default in any obligation under the mortgage (including any default referred to in paragraph A), we can enforce our above rights and we can enter on your property at any time, without the permission of any person, and make all arrangements that we consider advisable to:

1. Inspect, lease, collect rents or manage your property;
2. Repair or put in order any building on your property; or
3. Complete the construction of any building on your property. We can also take whatever action is necessary to take possession, recover and keep possession of your property.

**C. You will not interfere**

You will not interfere with our possession of your property (if we go into possession of your property in enforcing our above rights) nor with the possession of anyone to whom your property is sold or leased by us or any receiver. You agree not to make any claim concerning the sale or lease of your property against anyone who buys or leases it from us or any receiver, or anyone who buys or leases it after that time.

**D. Our expenses**

You will immediately pay all our expenses of enforcing our rights. Our expenses include our costs of taking or keeping possession of your property, an allowance for the time and services of our employees utilized in so doing, our legal fees on a solicitor and client basis and all other costs related to protecting our interest under that mortgage.

**E. Judgments**

If we obtain a court judgment against you for your failure to comply with any of your obligations to us under the mortgage, the judgment will not result in a merger of the terms of the judgment with our other remedies or rights to enforce your other obligations under the mortgage. We will continue to be entitled to receive interest on the loan amount at the rate payable on the loan amount and at the same times as provided for in the mortgage. The rate of interest payable on any judgment shall be calculated and payable in the same way as interest is calculated under the mortgage and at the same rate that interest is payable on the loan amount until the judgment has been paid in full.

**F. Delay in enforcement of our rights**

No delay or extension of time granted by us to you or any other person in exercising the enforcement of our rights under the mortgage nor any agreement made pursuant to any other provisions of this mortgage agreement shall affect our rights to:

1. Receive all payments you are obliged to make to us, when they are due and payable;
2. Demand that you repay the loan amount which is due and payable, on any default by you;
3. Have you comply with all of your obligations to us under the mortgage; or
4. Have any other person comply with the obligations that person has to us under the mortgage.



**Sample #2:****A. Power of Sale**

The Mortgagee on default of payment for at least fifteen (15) days may, on at least thirty-five (35) days' notice in writing given to the Mortgagor, enter on and lease the land or sell the land. Such notice shall be given to such persons and in such manner and form and within such time as provided by law and the policies of the Department of Indian and Northern Affairs Canada, as amended from time to time, which are currently contained in the Indian Lands Registration Manual and the Land Management Manual.

In the event that the giving of such notice shall not be required by law or to the extent that such requirements shall not be applicable, it is agreed that notice may be effectually given by leaving it with a grown-up person on the land, if occupied, or by placing it on the land if unoccupied, or at the option of the Mortgagee, by mailing it in a registered letter addressed to the Mortgagor at his last known address, or by publishing it once in a local newspaper; and such notice shall be sufficient although not addressed to any person or persons by name or designation; and notwithstanding that any person to be affected thereby may be unknown, not ascertained or under disability.

It is hereby further agreed that the whole or any part or parts of the land may be sold by auction or private contract, or partly one or partly the other; and that the proceeds of any sale hereunder may be applied first in payment of any costs, charges and expense incurred in taking, recovering or keeping possession of the land or by reason of non-payment or procuring payment of monies, secured by the Mortgage or otherwise, and secondly in payment of all amounts of principal and interest owing under the Mortgage; and if any surplus shall remain after fully satisfying the claims of the Mortgagees as aforesaid same shall be paid as required by law.

**Power of Sale (continued)**

The Mortgagee may sell any of the land on such terms as to credit and otherwise as shall appear to him most advantageous and for such prices as can reasonably be obtained therefor and may make any stipulations as to title or evidence or commencement of title or otherwise which he shall deem proper, and may buy in or rescind or vary any contract for the sale of the whole or any part of the land and resell without being answerable for loss occasioned thereby, and in the case of a sale on credit the Mortgagee shall be bound to pay the Mortgagor only such monies as have been actually received from the purchaser after the satisfaction of the claims of the Mortgagee and for any of said purposes may make and execute all agreements and assurances as he shall think fit. Any purchaser or lessee shall not be bound to see to the propriety or regularity of any sale or lease or be affected by express notice that any sale or lease is improper and no want of notice or publication when required hereby shall invalidate any sale or lease hereunder.

**B. Quiet Possession**

Upon default in payment of principal and interest under the Mortgage or in performance of any of the terms or conditions hereof, the Mortgagee may enter into and take possession of the land hereby mortgaged and where the Mortgagee so enters on and takes possession of the land on default as described in paragraph A herein the Mortgagee shall enter into, have, hold, use, occupy, possess and enjoy the land without the let, suit, hindrance, interruption or denial of the Mortgagor or any other person or persons whomsoever.

**C. Right to Distrain<sup>1</sup>**

If the Mortgagor shall default in payment of any part of the interest payable under the Mortgage at any of the dates or times fixed for the payment thereof, it shall be lawful for the Mortgagee to distrain therefor upon the land or any part thereof, and by distress warrant<sup>2</sup>, to recover by way of rent reserved, as in the case of a demise of the land, so much of such interest as shall, from time to time, be or remain in arrears and unpaid, together with all costs, charges and expenses

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<sup>1</sup> **Distrain** means to impose distraint, i.e., to seize chattels (tangible personal property/goods and leasehold interests) to make the mortgagor meet his/her obligations under the mortgage, or to obtain satisfaction of the arrears owing by their sale.

<sup>2</sup> **Distress Warrant** means a court order authorizing an officer (eg, a sherriff or bailiff) to make a distraint.

attending such levy or distress, as in like cases of distress for rent. The Mortgagee may distrain for arrears of principal in the same manner as if the same were arrears of interest.

**D. Further Assurances**

From and after default in the payment of the principal amount secured by the Mortgage or the interest thereon or any part of such principal or interest or in the doing, observing, performing, fulfilling or keeping of some one or more of the covenants set forth in the Mortgage then and in every such case the Mortgagor and all and every other person whosoever having, or lawfully claiming, or who shall have or lawfully claim any estate, right, title, interest or trust of, in, to or out of the land shall, from time to time, and at all times thereafter, at the proper costs and charges of the Mortgagor make, do, suffer and execute, or cause or procure to be made, done, suffered and executed, all and every such further and other reasonable act or acts, deed or deeds, devises, conveyances and assurances in the law for the further, better and more perfectly and absolutely conveying and assuring the land unto the Mortgagee as by the Mortgagee or his solicitor shall or may be lawfully and reasonably devised, advised or required.

**INDEX TO CHAPTER 4**

**LANDS USED FOR THE GENERAL WELFARE OF THE BAND**

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## 1. Purpose

1.1 This chapter explains how subsection 18(2) of the *Indian Act* may be used to authorize the use of reserve lands for the general welfare of the First Nation. It should be read for information or explanations regarding:

- a) **Policy:** The principles and requirements which govern the application of subsection 18(2).
- b) **Process:** The steps involved in the application of subsection 18(2) and how to carry them out.

## 2. General

2.1 Before reading this chapter, review Chapter 2, which explains how different sections of the *Indian Act* are intended to accomplish different purposes. Further information may be obtained from the staff contacts listed in this manual.

2.2 Subsection 18(2) of the *Indian Act* authorizes the use of reserve lands for certain types of purposes that benefit the First nation as a community, and are for the general welfare of the First Nation. To confirm that the proposed use of the reserve lands falls within the scope of subsection 18(2), the use must fit within one of the two categories mentioned in the statute:

a) a listed use: the purpose must be one of the uses specifically listed in the *Indian Act* i.e. Indian schools, administration of Indian affairs, Indian burial grounds, Indian health projects; or

b) for the general welfare of the band: these types of purposes are ones that benefit the First Nation as a community, and are available to all members of the First Nation.

2.3 Problems have arisen when an unauthorized use has been made of this subsection, to "get around" the requirements of other sections of the *Indian Act*. For example, a commercial enterprise (e.g. a tourist lodge) would not be an appropriate use, even though operated by the First Nation for its own benefit.

### EXAMPLE 1: AUTHORIZED/ UNAUTHORIZED USES

#### Authorized uses:

- **Infrastructure:** e.g. roads primarily for First Nation use
- **Public Buildings:** e.g. First Nation office or hall used for First Nation purposes
- **Public Services:** e.g. fire halls, police stations or schools serving the reserve
- **Utilities:** e.g. generating stations for First Nation use if operated by the First Nation.
- **Recreation Facilities:** e.g. arena, park, beach for First Nation use
- **Health Facilities:** e.g. nursing station, health centre or seniors' home for First Nation members
- **General Welfare:** e.g. church, cemetery or monument

#### Unauthorized uses:

- **Private Facilities:** e.g. privately operated malls or commercial uses
- **Transmission Lines:** e.g. Hydro and gas lines which do not serve the reserve
- **Tourist Facilities:** e.g. marinas, trailer parks, motels, hotels and service stations
- **Provincial Roads:** e.g. roads primarily serving off-reserve areas

- 2.4 The foregoing list of examples is not exhaustive. There may be instances where the intended use may have elements of both a public and private nature, or where it is not certain whether subsection 18(2) applies. For example, part of a First Nation office might be leased to a third party who uses the premises for commercial purposes. Such situations should be considered on a case by case basis, and good judgement must be exercised in the application of departmental policy. In the case of uncertainty, advice should be sought from headquarters.
- 2.5 Lands held in lawful possession can create difficulties. Dealing with such interests can be a long and complex process because the holders of lawful possession have a right to compensation. However, they cannot prevent the taking of the land provided the proposed use meets the requirements set out in this chapter.

### 3. Authorities

- 3.1 Departmental policy is governed by subsection 18(2) of the *Indian Act* which states that:

*18(2) The Minister may authorize the use of lands in a reserve for the purpose of Indian schools, the administration of Indian affairs, Indian burial grounds, Indian health projects or, with the consent of the council of the band, for any other purpose for the general welfare of the band, and may take any lands in a reserve required for those purposes, but where an individual Indian, immediately prior to the taking, was entitled to the possession of those lands, compensation for that use shall be paid to the Indian in such amount as may be agreed between the Indian and the Minister, or, failing agreement as may be determined in such manner as the Minister may direct.*

- 3.2 Note should also be made of section 65(a) which states that:

*The Minister may pay from capital moneys compensation to an Indian in an amount that is determined in accordance with this Act to be payable to him in respect of land compulsorily taken from him for band purposes.*

### 4. Process

- 4.1 The department's primary purpose is to ensure that lands are authorized under subsection 18(2) in a manner that respects the rights and interests of all parties affected. Consequently, lands will only be authorized once the policy requirements are satisfied.
- a) **Status of Land Confirmed:** Region must confirm that the land to be authorized is reserve land within the meaning of subsection 2(1) of the *Indian Act*. Subsection 18(2) cannot be used on lands which have been designated or absolutely surrendered.
  - b) **Appropriate Use Confirmed:** Region must confirm that the proposed use of the lands is authorized by the wording of subsection 18(2).



## Process (continued)

- c) **Band Council Consent Obtained:** The Council of the First Nation must consent to the proposed use by passing a Band Council Resolution (BCR). Consult with the *Indian Band Council Procedure Regulations* for information on the process. The department must obtain the consent of the First Nation council for the proposed use of the land. This must be done through a BCR which must, at a minimum, provide the following information:
- i) **Land Description:** A proper description of the lands to be taken. This will require either a Registration Plan or an Official Plan. A Registration Plan is prepared without a full survey of the land and is approved by the Registrar of Indian Lands and the Surveyor General of Canada Lands under section 31 of the *Canada Lands Surveys Act*. An Official Plan is prepared from field notes of an official survey of the land, done by a Canada Lands Surveyor, approved on behalf of the Minister and confirmed by the Surveyor General under section 29 of the *Canada Lands Surveys Act*. Further information on survey plans may be obtained by consulting the Indian Lands Registration Manual and the *Interdepartmental Agreement respecting Legal Descriptions of Indian Lands*, February 6, 1998.
  - ii) **Purpose:** A description of the purpose for which the lands will be used and a statement that the intended use is for the general welfare of the First Nation membership.
  - iii) **Land Status:** A statement that the lands to be used are unencumbered First Nation lands, free of any lawful possession, or a statement that encumbrances are not inconsistent with the proposed use. In cases where individuals in lawful possession are not willing to consent, the BCR should contain a request that the lands should be expropriated.
- d) **Lawful Possession Addressed:** Individuals with lawful possession in the land to be used must be fairly dealt with, i.e. fair compensation must be paid for the lands taken. If possible, compensation should be determined by mutual agreement. In cases where agreement can not be reached there must be an appraisal done to determine fair market value of the interest lost. The Department of Justice and Department of Public Works and Government Services (DPWGS) should be contacted to assist with this process.

- e) **Environmental Assessment:** The project developer must ensure that an environmental assessment is done in accordance with the *Canadian Environmental Assessment Act (C.E.A.A.)*
  - f) **Ministerial Order/Approval:** The Minister must either make an order authorizing the land for community purposes, or indicate his assent by approving the BCR which requests that the lands be so authorized. The former procedure will be required in cases where lawful possessions are affected under an expropriation action. Where the lands are First Nation lands at the outset, the First Nation exercising delegated authority or the region concerned will have the discretion to decide whether to obtain an order authorizing the land use or to simply have the BCR approved by the Minister.
- 4.2 **Negotiated Settlement:** Wherever possible, a mutually satisfactory arrangement with the holders of lawful possession should be negotiated. They should be informed at the outset that although the Minister may authorize the use of the lands without their consent, departmental policy is to try to negotiate a mutually acceptable arrangement. When the proposal is initiated by the First Nation, the First Nation council should be responsible for negotiating individual compensation. That being said, in situations where the taking of lands held in lawful possession is for community health or safety purposes and a period for long negotiations is not afforded, the First Nation should, if necessary, enlist the assistance of the INAC Lands Officer. When the project developer is not the First Nation, the INAC regional office should negotiate.
- 4.3 **Transfer:** Where a negotiated settlement is reached, allotments held by First Nation members should be transferred to the First Nation under section 24 of the *Indian Act*. Consult Chapter 3 for further details on the transfer of lawful possession.
- 4.4 **Non-consenting holders of Lawful Possession:** The *Indian Act* does not require the consent of individuals holding lawful possession of the land. However, it does require that they be adequately compensated for the loss of their interest. Our policy is to ensure that the affected individuals are treated in accordance with the requirements of the *Indian Act*. The following requirements should be observed when dealing with lawful possession where consent is not given:
- a) **Minimum Impact:** The manner in which the land is set aside should have the least possible impact on the individual interest. This could include taking a limited interest such as a right of way, or letting the individual continue to use the land in certain ways if such usage would be compatible with the proposed use of the land. The use of alternative sites should be considered and a decision to take the land should be justifiable based on the relevant facts.

- b) **Early Notice:** Individuals holding lawful possession of the land to be authorized under subsection 18(2) should be notified in writing of the plans for the land as soon as possible. The notice should be provided by the First Nation council when the First Nation is the proponent, which will be the case in most instances. Where the First Nation is not the proponent, the INAC regional office and the First Nation should provide notice.
- c) **Fair Compensation:** Individuals in lawful possession must be fairly compensated. Compensation may include arrangements such as the provision of other lands and the retention of some rights to the land. Where monetary compensation is provided for an interest being affected without consent, it should compensate the loss of the right to use the land. The amount to be paid should be determined by at least one independent appraisal. The appraisal(s) should be obtained with the assistance of the Department of Public Works and Government Services (DPWGS) and reviewed by the regional office. Ultimately, the Minister retains discretion to determine the amount of compensation payable. It should be noted that section 23 of the *Indian Act* states:
- 23. An Indian who is lawfully removed from lands in a reserve upon which he has made permanent improvements may, if the Minister so directs, be paid compensation in respect thereof in an amount to be determined by the Minister, either from the person who goes into possession or from the funds of the band, at the discretion of the Minister.*
- d) **Funding:** The source of funding may vary with the intended use. Where the land is required for a First Nation initiated project, payment of the appraisal costs and the compensation should come from First Nation funds. If the project is federally funded, then all such expenses should be budgeted as part of the overall cost of the project. Remember that section 65(a) of the *Indian Act* authorizes payment of compensation to an Indian from the capital moneys of the First Nation.
- 4.5 **Environmental Assessment:** The project developer, in most cases likely to be the First Nation council, must ensure that an environmental assessment is done in accordance with the *Canadian Environmental Assessment Act (C.E.A.A.)*. See Chapter 12 for more information.
- 4.6 The department must make final decisions under *C.E.A.A.* and cannot delegate its responsibility to third parties. Note however, that section 10 of *C.E.A.A.* stipulates that First Nation Councils will be responsible for ensuring that appropriate environmental assessments are conducted on Indian reserves for those projects which receive financial assistance from a federal authority.

- 4.7 The lands officer should ensure that First Nations clearly understand these responsibilities at the outset of a proposal and that the department will reject proposals which cause significant adverse environmental effects if these effects cannot be mitigated.

## 5. Revocation procedure

- 5.1 If land ceases to be used for the general welfare of the First Nation, on receipt of a BCR to that effect, Ministerial approval (or an order if desired) will be issued to return the lands to their previous status. If full compensation was provided to an individual who was in lawful possession of the lands prior to their taking and the lands were transferred to the First Nation, the lands will continue to be First Nation lands. Further, the lands may be re-allotted to another First Nation member pursuant to section 20 of the *Indian Act*, by the First Nation council. Revocation will only be possible where no third party interests have been created in the land in the interim, and where all interested parties agree that the "general welfare of the First Nation" use has ceased.

## 6. Implementation

- 6.1 This chapter will come into force upon distribution.

## 7. References

- 7.1 For more information you should read:
- a) *Indian Land Registry Manual*
  - b) *Interdepartmental Agreement respecting Legal Descriptions of Indian Lands*, February 6, 1998.

## 8. Checklist

- 8.1 This section provides an overview of the process for authorizing the use of reserve land under subsection 18(2) of the *Indian Act*. **Note** that Regional Director Generals have authority to authorize the use of land under section 18(2) on behalf of the Minister. First Nations with delegated authority **may not** have the same signing authority as the Regional Director General and their delegation instrument should be checked to determine the scope of their authority. In summary, the process involves the following major steps:
- a) **Request from First Nation Council.** The process should be initiated by a request from the First Nation council to authorize the use of reserve land.
  - b) **Verify purpose.** Ensure that the proposed use of the land falls within the statutory purposes of subsection 18(2).
  - c) **Identify land.** Identify the land to be used according to the appropriate plans and legal descriptions, in accordance with the requirements of the Indian Land Registry and the *Interdepartmental Agreement Respecting Legal Descriptions of Indian Lands*, February 6, 1998.
  - d) **Verify status.** Check if there are any encumbrances or individual holdings affecting the land to be used.
  - e) **Deal with individual in lawful possession.** Those with a stake in the land should be informed in writing of the plans for its use. If possible, an agreement on compensation should be reached and the transfer of any lawful possession to the First Nation pursuant to section 24 of the *Indian Act* should be completed and registered. **Note that a quit claim is not acceptable for this purpose.**
  - f) **Appraisal.** An appraisal should be made of the value of the land to be taken where there are lawful possessions affected. Care should be taken regarding the terms of reference, bearing in mind the limited market and the potential income generated. Regions should determine if a review by Public Works and Government Services (PWGS) is necessary.
  - g) **Verify available funds.** Check if there are adequate funds available to the First Nation to pay appropriate compensation.

## Checklist (continued)

- h) **Non-consent.** If lawful possession holders are not consenting, ensure written notice of the impending decision has been provided and a compensation offer is made based on an appraisal reviewed by PWGS. The individual must be given an opportunity to present arguments to the Minister via the Regional Director General. Refer to s. 23 of the *Indian Act* which addresses compensation for improvement to lands held in lawful possession.
- i) **Obtain BCR.** Have the First Nation Council pass a BCR meeting the requirements of this policy.
- j) **Obtain Environmental Assessment.** Ensure that the project developer has conducted an environmental assessment in accordance with C.E.A.A. requirements.
- k) **Issue a ministerial order/Obtain ministerial consent.** If lawful possession is affected and an order is required, prepare an order authorizing the use of the lands. If First Nation lands are being used, prepare and have approved an order authorizing the use or have the appropriate delegated official approve the BCR. Both procedures must be in accordance with the requirements of the *Indian Act*, this policy and delegated authority.
- l) **Payment of compensation.** In cases where lawful possessions are affected and must be compensated, upon issuance of the order, arrange for payment of compensation from Indian Moneys.
- m) **Register the order.** Submit the order and/or BCR authorizing the use of the land to the Indian Land Registry for registration.

## INDEX TO CHAPTER 5 DESIGNATION AND SURRENDER

### INDEX OF DIRECTIVES

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# Directive 5-1

## General Information

### 1. Purpose

- 1.1 This directive provides general information on surrenders and designations of reserve land.

### 2. Definitions

- a) **"designation"** means the conditional or unconditional surrender that is not absolute by a First Nation to Her Majesty of any right or interest of the First Nation and its members in all or part of a reserve, for the purpose of the reserve land being leased or a right of interest therein being granted as permitted under subsection 38(2) of the *Indian Act*, subsection 12.(2) of the *Manitoba Claim Settlements Implementation Act* and subsection 6.(2) of the *Claim Settlements (Alberta and Saskatchewan) Implementation Act*.
- b) **"Referendum Regulations"** means the *Indian Referendum Regulations*, C.R.C. 1978, c. 957;
- c) **"surrender"** means the release, either absolutely or not and either conditionally or unconditionally by a First Nation and its members in all or part of a reserve. In this chapter unless otherwise indicated, "surrender" refers to an absolute surrender as provided for in subsection 38(1) of the *Indian Act*.
- d) **"Department"** means, unless otherwise specified, Indian and Northern Affairs Canada or the Department of Indian Affairs and Northern Development;
- e) **"Minister"** means, the Minister of the Department of Indian Affairs and Northern Development;



### 3. General

- 3.1 Subsection 12.(2) of the *Manitoba Claim Settlements Implementation Act* and subsection 6.(2) of the *Claim Settlements (Alberta and Saskatchewan) Implementation Act* state that sections 39, 40 and 41 of the *Indian Act* apply to subsections 12.(1) and 6.(1) respectively of those acts and references to the Governor in Council should read as references to the Minister.
- 3.2 Section 38 of the *Indian Act* allows a First Nation to either surrender or designate all or part of its rights and interests in all or part of a reserve.
- 3.3 With limited exceptions under the *Indian Act*, before reserve land may be sold or leased to non-Indians, it must be surrendered or designated to the Federal Crown under the strict provisions of sections 37 to 41 of the *Indian Act*. Sections 28, 35, and 58 of the *Indian Act* outline the limited exceptions in which interests in or rights to use reserve lands may be granted to non-Indians without the need for a surrender or designation.
- 3.4 The surrender or designation deals with the collective interest of the entire membership.
- 3.5 By virtue of section 39 of the *Indian Act*, a surrender or designation is void unless:
- a) it is made to the Federal Crown;
  - b) a majority of electors of the First Nation have consented to the transaction; and,
  - c) the Governor in Council has accepted the surrender or designation.
- 3.6 A First Nation must show consent to a proposed surrender or designation by a vote:
- a) requested by the First Nation Council; and,
  - b) ordered by the Minister.

It is recommended that all votes be conducted according to the *Referendum Regulations*.

- 3.7 Section 40 of the *Indian Act* requires the Department and the First Nation to certify the surrender or designation and submit the surrender or designation to the Governor in Council.

- 3.8 Pursuant to section 41 of the *Indian Act*, a surrender or designation is deemed to confer all the rights necessary for the Federal Crown to carry out the terms of the surrender or designation.

## 4. Surrenders

- 4.1 When reserve land is surrendered, the Indian interest in the land may be extinguished and the land loses its reserve status. This means that:
- a) where a surrender is for the purposes of the sale of the land and subsequently the land is not sold, the Indian interest is still extinguished; and
  - b) the land will revert to those provinces which hold underlying legal title to the reserve lands, as happens with many reserves in Québec.
- 4.2 Surrender of reserve land for sale is extremely rare, given the irrevocable nature of the transaction.
- 4.3 Usually, First Nations will surrender reserve land when it is being exchanged for other lands to be added as reserve lands. Alternatively, surrenders of subsurface interests in reserve land are made when the First Nation wants only to dispose of subsurface interests such as mines or minerals.
- 4.4 The government passed the "Kamloops Amendment" (Bill C-115) in 1988 to amend subsection 38(2) of the *Indian Act*. The amendment distinguished between surrenders for sale (or exchange) and surrenders for leasing, by creating a "designation by way of a surrender" (known as a "designation"). The Kamloops Amendment ensures that designated reserve lands are still part of the reserve and subject to a First Nation's by-laws.

## 5. Designations

- 5.1 A designation may or may not have a lease (or leases) attached.
- 5.2 A designation without a lease attached is generally used where a First Nation wishes to designate land for leasing purposes to prepare the land for future development. In these cases there must be a provision in the designation document providing for the approval of the eventual lease terms by the First Nation Council.

- 5.3 Although the *Indian Act* sets out some exceptions, most leases of reserve land must be granted under a designation. A surrender of subsurface interests may also require the designation of surface rights for leasing purposes to allow the third party access to the reserve. A designation may also be used to grant an easement or in other circumstances where less than absolute ownership is being transferred.
- 5.4 As stated in paragraph 4.4 of this Directive, a designation does not extinguish the Indian interest in the land nor does it cause the land to lose its reserve status.
- 5.5 Designated land retains reserve status, however, the following sections of the *Indian Act* do not apply to designated lands:
- a) setting land aside under subsection 18(2);
  - b) allotting and transferring allotted land, etc. under subsections 20 - 25;
  - c) granting permits under subsection 28(2);
  - d) surrenders and designations under subsections 36 - 38 (a First Nation cannot surrender or designate previously designated land without first amending or revoking the existing designation);
  - e) Indian estate matters under sections 42, 44, 46, 48, 49 and 50;
  - f) mentally incompetent Indians under section 51;
  - g) granting leases of uncultivated land and locatee land under section 58;
  - h) adjustments of contracts under section 59; and,
  - i) delegations of management authority over reserve land under section 60.
- 5.6 Where a designation includes a project proposal, the lands officer must determine whether an environmental assessment under the *Canadian Environmental Assessment Act* is required. If an assessment is required, it must be done before the designation vote or the designation should make provision for the First Nation Council to approve the assessment.

## 6. Authorities

### 6.1 Departmental policy for surrenders and designations requiring Governor in Council approval is governed by sections 37 to 41 of the *Indian Act*.

37. (1) *Lands in a reserve shall not be sold nor title to them conveyed until they have been absolutely surrendered to Her Majesty pursuant to subsection 38(1) by the band for whose use and benefit in common the reserve was set apart.*

(2) *Except where this Act otherwise provides, lands in a reserve shall not be leased nor an interest in them granted until they have been surrendered to Her Majesty pursuant to subsection 38(2) by the band for whose use and benefit in common the reserve was set apart.*

38. (1) *A band may absolutely surrender to Her Majesty, conditionally or unconditionally, all of the rights and interests of the band and its members in all or part of a reserve.*

(2) *A band may, conditionally or unconditionally, designate, by way of a surrender to Her Majesty that is not absolute, any right or interest of the band and its members in all or part of a reserve, for the purpose of its being leased or a right or interest therein being granted.*

39. (1) *An absolute surrender or designation is void unless*

(a) *it is made to her Majesty;*

(b) *it is assented to by a majority of the electors of the band*

(i) *at a general meeting of the band called by the council of the band,*

(ii) *at a special meeting of the band called by the Minister for the purpose of considering a proposed absolute surrender or designation, or*

(iii) *by a referendum as provided in the regulations; and*

(c) *it is accepted by the Governor in Council.*

(2) *Where a majority of the electors of a band did not vote at a meeting or referendum called pursuant to subsection (1), the Minister may, if the proposed absolute surrender or designation was assented to by a majority of the electors who did vote, call another meeting by giving thirty days notice thereof or another referendum as provided in the regulations.*

(3) *Where a meeting is called pursuant to subsection (2) and the proposed absolute surrender or designation is assented to at the meeting or referendum by a majority of the electors voting, the surrender or designation shall be deemed, for the purposes of this section, to have been assented to by a majority of the electors of the band.*

(4) *The Minister may, at the request of the council of the band or whenever he considers it advisable, order that a vote at any meeting under this section shall be by secret ballot.*

(5) *Every Meeting under this section shall be held in the presence of the superintendent or some other officer of the Department designated by the Minister.*

40. A proposed absolute surrender or designation that is assented to by the band in accordance with section 39 shall be certified on oath by the superintendent or other officer who attended the meeting and by the chief or a member of the council of the band, and then submitted to the Governor in Council for acceptance or refusal.

41. An absolute surrender or designation shall be deemed to confer all rights that are necessary to enable Her Majesty to carry out the terms of the surrender or designation.

6.2 Departmental policy for pre-reserve designations requiring the Minister's approval is governed by the *Manitoba Claim Settlements Implementation Act* S.C., 2000, c. 33, section 12 and the *Claim Settlements (Alberta and Saskatchewan) Implementation Act*, S.C., 2002, c.3, section 6:

*Manitoba Claim Settlements Implementation Act*

12. (1) If the council of a first nation has, by resolution, requested that the Minister set apart certain lands as a reserve under an agreement to which this Part applies, the first nation may, either

(a) before the lands are transferred to Her Majesty in right of Canada by the first nation, by Her Majesty in right of Manitoba or by a third party, or

(b) before the lands are set apart as a reserve under section 11,

designate conditionally or unconditionally, by way of a surrender to Her Majesty in right of Canada that is not absolute, any right or interest in the lands, including for the purpose of the replacement of an existing right or interest in those lands.

*Application of Indian Act*

(2) Sections 39, 40 and 41 of the Indian Act apply in respect of a designation under subsection (1), any references to the Governor in Council being read as references to the Minister.

*Power of the Minister*

(3) On the acceptance by the Minister of a designation under subsection (1), the Minister may grant the designated right or interest to a third party.

*Effect*

(4) If a designation under subsection (1) is accepted by the Minister, the designation and the granting of the right or interest by the Minister take effect at the time the lands are set apart as a reserve under section 11.

*Certain acts deemed to have been done under Indian Act*

(5) As of the time when the Minister sets apart any lands as a reserve under section 11, any right or interest in the lands that was designated by way of a surrender under subsection (1), and any resulting grant that was made under subsection (3), are deemed to have been designated or made, as the case may be, under the Indian Act.

## *Claim Settlements (Alberta and Saskatchewan) Implementation Act*

6. (1) *If the council of a first nation has, by resolution, requested that the Minister set apart certain lands as a reserve under an agreement to which this Act applies, the first nation may, either*

*(a) before the lands are transferred to Her Majesty in right of Canada by the first nation, by Her Majesty in right of Alberta, by Her Majesty in right of Saskatchewan or by a third party, or*

*(b) before the lands are set apart as a reserve under section 5,*

*designate conditionally or unconditionally, by way of a surrender to Her Majesty in right of Canada that is not absolute, any right or interest in the lands, including for the purpose of the replacement of an existing right or interest in those lands.*

### *Application of Indian Act*

*(2) Sections 39, 40 and 41 of the Indian Act apply in respect of a designation under subsection (1), any references to the Governor in Council being read as references to the Minister.*

### *Power of the Minister*

*(3) On the acceptance by the Minister of a designation under subsection (1), the Minister may grant the designated right or interest to a third party.*

### *Effect*

*(4) If a designation under subsection (1) is accepted by the Minister, the designation and the granting of the right or interest by the Minister take effect at the time the lands are set apart as a reserve under section 5.*

### *Certain acts deemed to have been done under Indian Act*

*(5) As of the time when the Minister sets apart any lands as a reserve under section 5, any right or interest in the lands that was designated by way of a surrender under subsection (1), and any resulting grant that was made under subsection (3), are deemed to have been designated or made, as the case may be, under the Indian Act.*

## **7. Policy**

- 7.1 The Department's chief objective is to ensure that reserve lands are surrendered or designated in a way that respects the rights and interests of the First Nation and other affected parties. Consequently, a surrender or designation will only be done where the relevant statutory provisions and departmental policy requirements are satisfied. This Chapter includes separate policy statements for each requirement.

## **8. Process**

- 8.1 The different statutory and policy-based procedures must be followed correctly to ensure the validity of the transaction. The directives in this chapter will provide specific guidance in this respect.

## 9. Implementation

- 9.1 This chapter replaces previous policy directives, previous Land Management Manuals and Chapter 5 of the Land Management Manual, dated January 31, 1997, dealing with this subject matter. This Chapter will come into force upon distribution.

## 10. References

- 10.1 For more information you should refer to:
- a) Chapter 3 of this Manual for additional information on individual interests in reserve lands;
  - b) Chapters 2 and 7 of this Manual for information on the exceptions to the designation requirement for leasing;
  - c) Chapter 7 of this Manual for a review of the requirements for different types of leases, whether on designated or other reserve lands;
  - d) the *Indian Referendum Regulations*, which came into effect November 20, 2000;
  - e) Indian Lands Registration Manual;
  - f) *Indian Act*;
  - g) *Manitoba Claim Settlements Implementation Act*;
  - h) *Claim Settlements (Alberta and Saskatchewan) Implementation Act*.

# Directive 5-2

## Addressing Locatee and Third Party Interests

### 1. Purpose

- 1.1 This directive provides information on how to deal with locatee and other individual interests affected by a proposed surrender or designation.

### 2. General

- 2.1 Where an individual First Nation member is in lawful possession of lands and those lands are subsequently surrendered, the land is removed from reserve status and the individual's interest in the land is extinguished. However, in the case of a designation, the land retains reserve status although the individual's interest in the land is extinguished.
- 2.2 The interests of locatees and other individuals affected by a proposed surrender or designation must have been addressed with before the surrender or designation vote is held.

### 3. Authorities

- 3.1 Some relevant statutory authorities include:

*Indian Act*, R.S.C. 1985, c. I-5, subsection 2(1), section 23 and section 24.

2. (1) *In this Act,*

...

*"designated lands" means a tract of land or any interest therein the legal title to which remains vested in Her Majesty and in which the band for whose use and benefit it was set apart as a reserve has, otherwise than absolutely, released or surrendered its rights or interests, whether before or after the coming into force of this definition;*

*"reserve"*

...

*(a) means a tract of land, the legal title to which is vested in Her Majesty, that has been set apart by Her Majesty for the use and benefit of a band, and*



(b) *except in subsection 18(2), sections 20 to 25, 28, 36 to 38, 42, 44, 46, 48 to 51, 58 to 60 and the regulations made under any of those provisions, includes designated lands;...*

*"surrendered lands" means a reserve or part of a reserve or any interest therein, the legal title to which remains vested in Her Majesty, that has been released or surrendered by the band for whose use and benefit it was set apart.*

23. *An Indian who is lawfully removed from lands in a reserve upon which he has made permanent improvements may, if the Minister so directs, be paid compensation in respect thereof in an amount to be determined by the Minister, either from the person who goes into possession or from the funds of the band, at the discretion of the Minister.*

24. *An Indian who is lawfully in possession of lands in a reserve may transfer to the band or to another member of the band the right to possession of the land, but no transfer or agreement for the transfer of the right to possession of lands in a reserve is effective until it is approved by the Minister.*

## 4. Policy - Locatee Interests

- 4.1 Locatee interests should be extinguished prior to a referendum vote on a proposed surrender or designation.
- 4.2 Where a locatee is in lawful possession of lands to be surrendered or designated, the policy requires that:
- a) the locatee be notified by the regional office that the First Nation Council has proposed a surrender or designation of land in which the locatee has an interest;
  - b) the First Nation Council make every reasonable effort to reach an agreement to secure voluntary transfer of the locatee's interest to the First Nation under section 24 of the *Indian Act* prior to the surrender or designation vote. A quit claim deed is **not** an acceptable means of extinguishing lawful possession; and
  - c) the First Nation Council deal with any custom interest holders (see paragraphs 4.4, 4.5 and 6.2 of this Directive).
- 4.3 Where the First Nation and a locatee cannot agree on a voluntary transfer pursuant to section 24 of the *Indian Act*, the situation will be considered on its particular facts.

- 4.4 Certain First Nations do not subscribe to the allotment provisions under the *Indian Act*. Instead, these First Nations grant individuals "occupational rights at the pleasure of the First Nation Council." Since these custom allotments are not authorized under the *Indian Act*, the lands officer is not responsible for informing any custom interest holders of a proposed surrender or designation. However, the Chief and Council of the First Nation should be advised to address the concerns of any custom land holder affected by any such proposal.
- 4.5 In addition, section 23 of the *Indian Act* (Compensation for Improvements) does not apply to traditional or custom holdings of reserve land.
- 4.6 The Department may, in limited cases, accept a development proposal which includes a combination of designated land leased under subsection 53(1) and locatee land leased under subsection 58(3) of the *Indian Act*. This type of arrangement is most practical where a locatee is also the project proponent.

## 5. Policy - Third Party Interests

- 5.1 The lands officer must identify all lawful third party interests acquired through permits, easements, locatee leases, etc. at the outset of a proposed surrender or designation.
- 5.2 If third party interests are incompatible with the terms of a proposed surrender or designation:
- a) they must be removed prior to the referendum vote; or,
  - b) the land which is subject to these interests must be excluded from the proposed surrendered or designated area.
- 5.3 If third party interests are compatible with the terms of a proposed surrender or designation, the surrender or designation may be made subject to these interests.

## 6. Process

- 6.1 This section provides an overview of the process for addressing locatee and other interests in a surrender or designation.

- 6.2 When the First Nation notifies the lands officer of a proposed surrender or designation, the lands officer must search the Indian Lands Registry records to identify any locatee or other third party interest in the land to be surrendered or designated, and
- a) inform the First Nation Council of any affected locatees or other third party interest and notify those parties of the proposed surrender or designation;
  - b) recommend to the First Nation and locatees to begin negotiations to secure a transfer of locatee interests to the First Nation, pursuant to section 24 of the *Indian Act*;
  - c) recommend to the First Nation Council to deal with any custom interest holders (see paragraphs 4.4 and 4.5 of this Directive);
  - d) recommend to the First Nation to begin negotiations to extinguish any other existing third party interests; and
  - e) refer any disputes with respect to locatee or the third party interests to the Department (HQ) for assistance.

## 7. References

- 7.1 For more information you should refer to:
- a) Directive 3-7 of this Manual for more information on compensation for improvements pursuant to section 23 of the *Indian Act*;
  - b) Directive 3-4 of this Manual for more information on transfer of possession pursuant to section 24 of the *Indian Act*.

# Directive 5-3

## Terms and Conditions of Surrenders and Designations

### 1. Purpose

- 1.1 This directive provides information on both the mandatory and discretionary terms and conditions of proposed surrenders and designations.

### 2. General

- 2.1 A First Nation Council usually sets the discretionary terms and conditions of a proposed surrender or designation.
- 2.2 The terms and conditions of a surrender are usually straightforward, since the land will be sold or exchanged.
- 2.3 The terms and conditions of a designation may be very complex as they will generally reflect both the type of development being considered and the interests of the First Nation.
- 2.4 Most surrenders and designations are conditional:
- a) a surrender will normally be conditional upon a receipt of compensation in the form of money and/or replacement land;
  - b) a designation will usually contain specific requirements regarding land use, the term, licensing (where applicable), etc.

### 3. Authorities

- 3.1 Relevant statutory authorities include: *Indian Act*, R.S.C. 1985, c. I-5, section 38 (reproduced in Directive 5-1 of this Manual).

## 4. Policy

- 4.1 To help a First Nation Council determine appropriate terms and conditions for a surrender or designation, the lands officer must:
- a) disclose to the First Nation Council all relevant information in the Department's knowledge and possession;
  - b) discuss with the First Nation Council the details of the proposed transaction; and
  - c) recommend to the First Nation Council that they seek independent legal advice and/or professional advice.
- 4.2 The surrender or designation document must clearly state the legal description, the proposed use (if known), the duration, and the consideration (i.e. money, replacement land) that the First Nation will receive, as appropriate. (See Appendix A to this Directive).
- 4.3 The *Indian Act* does not limit the proposed use of the land following a designation. A First Nation may therefore stipulate any proposed use in the designation document, if it is legally acceptable.
- 4.4 The lands officer must advise the First Nation that, where sufficient information to determine that an identifiable project will be the subject of the designation, an environmental assessment will be conducted following the Canadian Environmental Assessment Act.
- 4.5 A designation which has a lease attached must clearly state the proposed use or uses of the land to be designated, such as a shopping centre, trailer park, industrial complex, etc. It must also specify the principal conditions of the lease such as rent, payment details, rent reviews, term of the lease, insurance requirements, legal description of the property, etc.
- 4.6 A surrender or designation document should also specify any restrictions which the First Nation Council deems important.
- 4.7 Since a surrender involves a complete and final release of the entire Indian interest in the surrendered lands, the duration must be expressed as "forever" in the surrender document. Statements such as "... notwithstanding this surrender, title remains with Her Majesty ..." are not appropriate terms or conditions.

- 4.8 A designation should be for a fixed term, taking into consideration the proposed use of the land and the time required to make the proposal viable. Any leases issued for the designated land must terminate at least one day before the termination date of the designation.
- 4.9 A designation for an indeterminate period would only be appropriate in cases such as where a designation for access purposes is necessary to enable the extraction of resources, such as minerals, and oil or gas.
- 4.10 A First Nation should receive compensation which reflects fair market value. Where a surrender or designation proposes less than fair market value, it must also identify the benefits accruing to the First Nation in lieu of fair market value.

## 5. Policy - Terms and Conditions

- 5.1 The Department must ensure that, with a proposed surrender or designation, the First Nation will receive, at a minimum, fair market value or an equivalent alternative benefit for the interest being granted to a third party:
- a) where a First Nation corporation is the intended lessee and will pay nominal rent or receive other preferential treatment, the lands officer must ensure that third parties who are not members of the First Nation will not benefit from the proposed nominal rent (i.e., through share transfers, etc.);
  - b) where the lands officer has any doubts about the value being proposed, he or she must advise the First Nation Council in writing; and
  - c) the Information Document prepared for the electors must clearly show the proposed compensation as well as the fair market value and the surrender or designation document must clearly state the First Nation's acceptance of both items.
- 5.2 A designation without an attached lease must **at a minimum**:
- a) indicate the general proposed land use (if known), e.g., commercial, industrial, residential, etc.;
  - b) set out the principal terms and conditions of any proposed lease agreement, for example, whether rent will be set at fair market value, method of rent collection, proposed use of the land, term of the lease, etc.; and
  - c) specify the powers of the First Nation Council to develop the land and to approve or reject future proposals, including the authority to review environmental assessments which are conducted after the vote and to approve the final lease document when it becomes available.

- 5.3 It is desirable that a designation without an attached lease be as specific about the proposed land use as is possible.
- 5.4 The inclusion of other terms and conditions will reflect the particular proposal under consideration, as well as the interests of the First Nation. However, the lands officer should advise the First Nation that:
- a) including only essential terms and conditions in the designation is preferable; and
  - b) any amendment or revocation of the designation will require a vote by the electors of the First Nation, unless the original designation document contains a clause which allows for the correction of a clerical error or other minor amendment or for the revocation of the designation from all or part of the lands via a Band Council Resolution. A submission for official acceptance of the amendment or revocation would then be made without the need for a vote. (See Directive 5-5 of this manual for more information on this process.)
- 5.5 Further to paragraph 5.4 b) above, the lands officer should recommend that the First Nation Council consider including a clause in the designation document to allow the First Nation to revoke or make minor amendments to the designation without the requirement for a vote as described in Directive 5-5, paragraphs 4.3 to 4.6.
- 5.6 Where a clause as indicated in paragraph 5.5 above is proposed, the lands officer must ensure that the Information Document discloses the proposed authority of the First Nation Council to request the revocation or minor amendment of a designation for the membership, without a requirement for a vote and the consequences of such an authority.
- 5.7 The lands officer must appropriately document relevant discussions and meetings he or she has with a First Nation Council regarding the terms and conditions of a proposed surrender or designation.

## **6. Process**

- 6.1 The lands officer must:
- a) disclose relevant information in the Department's knowledge and possession to the First Nation Council;
  - b) discuss the general parameters of the proposed transaction with the First Nation Council;

- c) inform the First Nation Council that an environmental assessment will be required when a project is identified for designated lands;
- d) recommend that the First Nation Council seek independent legal or other professional advice;
- e) review all proposed terms and conditions to ensure the proposal meets departmental policy and prepare the draft surrender or designation documents; and
- f) review the Information Document and any information the First Nation may receive from developers and independent professional advisors to ensure that such information is fair, accurate and comprehensive or needs further study.

## **7. References**

### 7.1 For related information you should refer to:

Chapter 10 of this Manual for information on how unsold surrendered land may be returned to reserve status.



# Directive 5-4

## How to Surrender or Designate Reserve Lands by Referendum

### 1. Purpose

- 1.1 This Directive explains how reserve lands may be validly surrendered or designated. You should read this Directive for information on:
- a) **Policy:** It states the principles and requirements governing a surrender or designation of reserve lands.
  - b) **Procedures:** It outlines the steps required to make a valid surrender or designation.

### 2. General

- 2.1 A surrender or designation must meet all statutory and policy requirements to be recommended for acceptance by the Governor in Council or Minister.
- 2.2 The Department has developed policy requirements to ensure that a surrender or designation vote is acceptable under the *Indian Act* and that the First Nation is meeting the requirements of informed consent to the proposed surrender or designation.
- 2.3 The First Nation Council initiates the surrender or designation process by requesting a referendum. The purpose of the referendum is to determine if a majority of the electors of the First Nation are in favour of the proposed surrender or designation and the proposed transaction or intended use.
- 2.4 All First Nations must include off-reserve members of the First Nation when conducting a vote. It is recommended that the *Referendum Regulations* be followed in all cases.
- 2.5 An environmental assessment is commenced in accordance with the *Canadian Environmental Assessment Act*.
- 2.6 Prior to the referendum, an Information Document must be circulated to the electors and at least one information meeting must be held to give the electors as much information about the proposed surrender or designation as possible.

- 2.7 A departmental officer appointed by the Minister oversees the voting process and certifies the result.
- 2.8 If the surrender or designation is assented to by the electors, the Department will prepare a submission recommending acceptance of the proposed surrender or designation. If accepted, the transaction is registered in the Indian Lands Registry.
- 2.9 Although the term "First Nation" is used throughout this chapter, all required documents must refer to a "Band" where applicable, as this term has a particular meaning under the *Indian Act*.

### **3. Authorities**

- 3.1 Relevant statutory authorities include: *Indian Act*, R.S.C., 1985, c. I-5, sections 39 and 40 (reproduced in Directive 5-1 of this Manual) and the *Referendum Regulations*.

### **4. Policy**

- 4.1 The Department will not recommend a surrender or designation for acceptance until all statutory and policy requirements including those related to informed consent and certification, and any environmental assessment requirements have been satisfied.
- 4.2 Although the Minister has discretion under the *Referendum Regulations* to order a referendum anytime, he or she will normally issue such an order only upon request by a First Nation Council.
- 4.3 A Band Council Resolution (BCR) requesting a referendum should set out:
- a) the date, time and place planned for the referendum vote;
  - b) the purpose of the proposed surrender or designation;
  - c) that the First Nation Council requests the Minister to order a referendum;
  - d) the legal description of the lands to be surrendered or designated;

- e) the term;
  - f) the compensation; and
  - g) the request for the appointment of an electoral officer.
- 4.4 All referenda conducted under the *Referendum Regulations* require at least 42 days from posting and mail out of notices to the date of the referendum; consequently, early notice from the First Nation Council should be encouraged to give the Department sufficient time to:
- a) check the land for encumbrances, including locatee interests;
  - b) give the First Nation any pertinent information in the Department's knowledge or possession;
  - c) prepare the surrender or designation documentation;
  - d) arrange for the electoral officer to attend the vote;
  - e) in consultation with the First Nation Council, arrange for an interpreter, who may be required to help in the translation of a ballot or other pertinent documents; and
  - f) otherwise provide any requested assistance to the First Nation Council.

## 5. Policy - Lands Officer

- 5.1 The lands officer must:
- a) give the First Nation any relevant information in the Department's knowledge and possession;
  - b) inform the First Nation Council to post adequate notice of and hold at least one information meeting;
  - c) ensure the First Nation Council has prepared an Information Document;
  - d) prior to the posting or mailing of the Information Document, review the Information Document and information provided to the First Nation by the developer or the First Nation's independent advisors to ensure the information is complete and accurate;

- e) with the assistance of the First Nation, arrange for an interpreter, if needed;
- f) prepare the surrender or designation documentation;
- g) attend the information meeting and prepare notes on the meeting for the file;
- h) provide any other required assistance to the First Nation Council;
- i) if the vote is successful, prepare a submission recommending acceptance of the surrender or designation (see Chapter 13 of this Manual);
- j) inform the First Nation Council of the acceptance or rejection of the submission; and
- k) if accepted, submit the surrender or designation and the accepting order for registration in the Indian Lands Registry.

## 6. Policy - Electoral Officer

- 6.1 After receiving the BCR, the Minister appoints an electoral officer to oversee the referendum. The Minister must make the appointment before the notice period for the referendum begins.
- 6.2 The electoral officer appointed by the Minister must be a departmental employee as specified in the *Referendum Regulations*.
- 6.3 Employees of a First Nation with delegated authorities under sections 53 and 60 of the *Indian Act* are not departmental employees. Therefore, they cannot be appointed as electoral officers for a referendum vote.
- 6.4 The referendum's electoral officer may appoint a deputy electoral officer. The deputy electoral officer can perform some, but not all, of the duties of the electoral officer, as set out in the *Referendum Regulations*.
- 6.5 The deputy electoral officer does not have to be a departmental employee and may be a member of a First Nation.
- 6.6 The electoral officer must:
  - a) prepare a list of electors where the Department is responsible for preparation of the list (section 11 Band), or obtain a certified list of electors where the the First Nation has control of its membership code (section 10 Band);
  - b) post the list of electors;

- c) post the Notice of Referendum of Absolute Surrender or Designation;
- d) for those electors who live off reserve and for whom a mailing address has been given or who cannot appear at the polling station (e.g. because of disabilities) prepare and mail out ballot packages, which include the Information Document, the designation or surrender document, the Notice of Referendum, the notice for any information meetings, postage paid return envelope pre-addressed to the electoral officer, a second inner envelope marked "Ballot" for insertion of the completed ballot, a ballot, a voter's declaration form, and a letter of instruction regarding voting by mail-in ballot;
- e) attend one information meeting;
- f) prepare sufficient ballot papers for the day of the vote;
- g) attend the referendum;
- h) swear in any required interpreter;
- i) examine the ballot boxes;
- j) count the ballots;
- k) certify the surrender or designation and other required documents; and
- l) perform other miscellaneous duties set out in the *Referendum Regulations*.

## **7. Policy - Information Document**

- 7.1 In order to ensure that informed consent of the First Nation has been given, an information document must be prepared and distributed or made available to First Nation electors for all proposed surrenders and designations.
- 7.2 At a minimum, the Information Document must contain the following information:
  - a) that a surrender or designation of reserve lands is being proposed;
  - b) the purpose of the proposal;
  - c) for a designation, its proposed term;

- d) a legal description of the lands to be surrendered or designated and any available maps, sketches or plans, etc.;
- e) the name of the prospective purchaser or lessee and any sublessees (if known);
- f) the amount and/or form of compensation and whether or not this amount reflects fair market rent or nominal consideration;
- g) if nominal consideration is intended, clear identification of the nature of the alternative benefit and of the fair market rent;
- h) for a designation, the basis and frequency for reviewing rents (at a minimum, rent reviews must be done every five years - see Chapter 8 of this Manual);
- i) for a designation, that the lessor may mortgage the leasehold interest, and the name of the prospective mortgagee (if known);
- j) any other development opportunities which were rejected, and for what reasons, including any alternatives if the surrender or designation fails;
- k) the results of an environmental assessment, including any appropriate consultants' reports, and whether there is a requirement for additional clauses in the lease to protect the First Nation's interest;
- l) any other appropriate conditions the First Nation Council would like to include;
- m) for a designation without a lease attached, the specifics of the authority of the First Nation Council to carry out transactions under its terms;
- n) for a designation with a lease attached, reference to and copies of any applicable leases;
- o) the nature and scope of the First Nation Council's authority, if any, to request the revocation or amendment of a designation without a vote of its electors;
- p) any other information needed for the electors to make an informed decision about the proposal; and,
- q) who to contact for further information or discussion.

## 8. Policy - Information Meeting

- 8.1 The lands officer must advise the First Nation Council that they **must** hold at least one information meeting before the electors vote on a proposed surrender or designation.
- 8.2 As soon as possible, the First Nation Council should advise the lands officer of the date(s) planned for the information meeting(s) as the Notice of Referendum package must be posted at least 42 days prior to the day of the vote and at least 14 days prior to the meeting, and must include notice of the meeting.
- 8.3 For mail out ballots, the information package must include the notice of the information meeting and a copy of the Information Document to be discussed at the meeting, along with the other documents set out in paragraph 6.6 a) to 6.6 d) of this Directive.
- 8.4 Where the Information Document is not posted with the Notice of Referendum, it must be otherwise distributed or made available to the electorate (through either household mailings or at the First Nation Council office) before the information meeting.
- 8.5 An information meeting should be held sufficiently ahead of the vote to allow electors time to consider the information and ask any questions concerning the surrender or designation and its purpose, but must be at least 14 days after the notice of Referendum has been posted.
- 8.6 The First Nation Council may decide to hold more than one information meeting. They would likely hold a second information meeting:
  - a) where the First Nation electors are dispersed in a way that makes it practical to hold a second meeting to ensure that all electors have an opportunity to be briefed on the proposal;
  - b) where the proposed surrender or designation is particularly complicated, involves a major development for the area, or is expected to be controversial;
  - c) where significant issues or concerns are raised at the first information meeting; or
  - d) before they hold a second referendum under subsection 39(2) of the *Indian Act*.

- 8.7 The lands officer must also recommend to the First Nation Council that:
- a) an interpreter be present at the information meeting, where this would be necessary to properly inform the electors;
  - b) the First Nation's lawyers, accountants, marketing consultants, environmental consultants, etc. attend the meeting if they can help the First Nation Council to present the proposal and answer any questions; and
  - c) a departmental representative should attend the information meeting to explain the referendum process and take minutes, however, in rare cases, the Department could accept a certified copy of the minutes from the First Nation Council.
- 8.8 A departmental representative must attend the information meeting if it is expected that the proposed surrender or designation may be controversial, as a precaution to ensure that all the relevant information is impartially presented.

## 9. Policy - Voting

- 9.1 A referendum vote must be held by secret ballot for all surrenders and designations in accordance with the *Referendum Regulations*.

## 10. Policy - Notice Requirements

- 10.1 The electoral officer or the deputy electoral officer must post the Notice of Referendum at least 42 days before a referendum. In addition to the requirements under the *Referendum Regulations*, the Notice of Referendum package must:
- a) give at least 14 days notice of the information meeting ;
  - b) include a copy of the Absolute Surrender or Designation document as an attachment to the notice;
  - c) include a copy of the Information Document when mail out ballots are applicable; and,
  - d) either include a copy of the list of electors or say that the list will be posted at least 42 days before the date of the referendum.



## 11. Policy - List of Electors

- 11.1 a) The electoral officer must prepare a list of electors;
- b) The electoral officer and the Chief or member of the First Nation Council must sign the list of electors; and,
- c) The electoral officer or the deputy electoral officer must post the list of electors at least 42 days before the referendum in places the electoral officer deems are necessary.
- 11.2 The electoral officer or the deputy electoral officer should post the notice and the list of electors in locations where the general membership goes regularly.
- 11.3 The electoral officer may revise the elector's list if an elector requests a revision because the list:
- a) omits an elector's name;
- b) incorrectly sets out an elector's name; or,
- c) includes the name of a person not qualified to vote.
- 11.4 An elector may apply to revise the list of electors according to the criteria set out in subsection 4 (5) of the *Referendum Regulations*.
- 11.5 Any revision of the list of electors must comply with the *Referendum Regulations*.

## 12. Policy - Voting Majority

- 12.1 **Absolute Majority** occurs when 50% of the **eligible** electors plus one consent to the proposal.
- 12.2 An absolute majority of eligible electors is not required to constitute valid consent at a referendum.
- 12.3 **Majority of a Majority** occurs when a majority of all eligible electors vote, and a majority of the ballots cast are in favour of the proposed surrender or designation.
- 12.4 At a first referendum, valid First Nation consent requires a "majority of a majority" vote in favour of the proposal.

- 12.5 **Vote Qualifying for Second Referendum** where less than a majority of eligible electors vote at the first referendum, but a majority of the electors who did vote supported the proposed surrender or designation, the vote fails. The First Nation Council may then ask the Minister to call a second vote under subsection 39(2) of the *Indian Act*.
- 12.6 **Simple Majority** occurs when, no matter how many electors are eligible to vote, a majority of those who actually cast a ballot vote in favour of the proposed surrender or designation.
- 12.7 At a second referendum, a simple majority is required to constitute valid consent.
- 12.8 Spoiled ballots are counted to determine the number of electors who actually voted. Spoiled ballots must not be counted as either votes in favour of or against a proposal. Note that spoiled ballots are not the same as ballots set aside under paragraphs 17.1(a) and 18.1 (a.1) of the *Referendum Regulations*.

**EXAMPLE 1  
DETERMINING MAJORITY CONSENT**

**Example of an "Absolute Majority"** *(not required for valid consent to a surrender or designation)*

100 electors are eligible to vote:

At least 51 eligible electors must vote in favour.

**Example of a "Majority of a Majority"** *(required for valid consent at a first surrender or designation referendum)*

100 electors are eligible to vote:

At least 51 eligible electors must vote (include spoiled ballots to count the total number who voted).

At least 26 electors out of the 51 must vote in favour.

**Example of Voting Results which Qualify for a Second Referendum**

100 electors are eligible to vote:

If 30 eligible electors vote (include spoiled ballots to count the number who voted), at least 16 electors out of the 30 must vote in favour.

**Example of a "Simple Majority"** *(required for valid consent at a second referendum)*

No matter how many electors are eligible to vote:

If 40 eligible electors vote,  
at least 21 of the electors must vote in favour.

## 13. Policy - Second Referendum

- 13.1 Where a first vote fails but meets the relevant criteria for holding a second referendum (less than a majority of electors voted at a referendum but a majority of these electors consented to the proposal), the Minister, usually at the request of the First Nation Council, may order a second referendum as provided in the *Indian Act*.
- 13.2 Where a first vote fails but does not meet the relevant criteria for holding a second referendum set out in the *Indian Act* and *Referendum Regulations*, or where a second vote fails to receive the support of a simple majority:
- a) the period for waiting to hold a subsequent "first" vote will be assessed on a case by case basis;
  - b) the First Nation Council and the lands officer should consider factors such as limited resources, the chances for success, etc. before deciding to hold another vote.
- 13.3 Notice of a second referendum must refer to the proposal voted on at the first referendum, although extra information may be provided. The subject matter of the second vote and the question to be put to the electors must be identical to those in the first referendum.
- 13.4 Under subsection 39(3) of the *Indian Act*, a simple majority voting in favour of the proposal at the second referendum will be deemed to constitute consent by a majority of the electors of the First Nation.

### EXAMPLE 2 SECOND REFERENDUM

A First Nation has 100 electors eligible to vote on a proposed designation. Only 49 electors vote at the first referendum but 25 electors consent to the proposal. Although the first vote fails, pursuant to subsection 39(2) of the *Indian Act*, the First Nation Council may ask the Minister to call a second referendum. At the second referendum, if 49 electors vote and 25 of those voters consent, a majority of electors will be deemed to have consented to the designation.

## 14. Policy - Documentation

- 14.1 The failure to submit any of the required documents may result in rejection of the proposed surrender or designation.
- 14.2 Precedent documents are available from regional offices.
- 14.3 Three sets of originals of the documents mentioned in paragraph 14.5 (l, m and p) below must be prepared and executed. The region and the First Nation Council each receive one set of documents. The other set is needed for registration in the Indian Lands Registry, following approval of the order accepting the surrender or designation.
- 14.4 Where a First Nation refuses to obtain legal or other professional advice with respect to a proposed surrender or designation, the lands officer should obtain a resolution from the First Nation Council waiving such advice and stating the reason for its refusal.
- 14.5 The Department requires the following documents:
- a) a copy of the BCR asking the Minister to order a referendum;
  - b) where applicable, a copy of the BCR confirming the custom rules governing eligibility to vote for the Chief and Council of the First Nation;
  - c) a copy of the Ministerial Order appointing the electoral officer;
  - d) where applicable, a copy of the appointment of a deputy electoral officer by the electoral officer;
  - e) a copy of the posted Notice of Referendum;
  - f) a copy of the information meeting notice, where it is separate from the Notice of Referendum;
  - g) a copy of the elector's list which the electoral officer and either the Chief or a Councillor of the First Nation have certified;
  - h) a copy of the Information Document;
  - i) a copy of the minutes of the information meeting(s) (certified by a quorum of the First Nation Council if a departmental representative has not attended the meeting(s));

- j) a copy of any other documents needed to show that the First Nation electors were fully informed;
  - k) an interpreter's oath, where applicable;
  - l) the Absolute Surrender or Designation document (also called the Instrument of Absolute Surrender or Instrument of Designation);
  - m) sworn certification of the Absolute Surrender or Designation document by the designated electoral officer and the Chief or a Councillor of the First Nation pursuant to section 40 of the *Indian Act*;
  - n) declaration of the examination of the ballot box under section 7 of the *Referendum Regulations*;
  - o) a polling statement under subsection 18(1)(d) of the *Referendum Regulations*, signed by the electoral officer and the Chief or a Councillor of the First Nation;
  - p) a statement of referendum results under subsection 19(a) of the *Referendum Regulations* signed by the electoral officer and the Chief or a Councillor of the First Nation;
  - q) a copy of the ballot used; and
  - r) a report of the results of the environmental assessment, if applicable.
- 14.6 An interpreter's oath and the certification of the Absolute Surrender or Designation document are affidavits. These sworn statements:
- a) must be witnessed and stamped by a Commissioner of Oaths; and
  - b) must have each page initialled by the Commissioner of Oaths and stamped, if the affidavit is longer than one page.
- 14.7 Where a second referendum is held under subsection 39(2) of the *Indian Act*:
- a) the Absolute Surrender or Designation document must be identical to the Absolute Surrender or Designation document for the first referendum; and,
  - b) the affidavits and statements for second votes must show that a first vote was held.

14.8 All of the documents outlined in this policy must be executed and kept on a regional file.

## **15. When a First Nation does not consent**

15.1 If a First Nation does not consent to a proposed surrender or designation, the lands officer must still document the results of the vote and the reason(s) the surrender or designation failed.

15.2 Documents must be kept on the regional file but are not submitted for approval or registration.

## **16. Process**

16.1 This section provides an overview of the process for the surrender or designation of reserve lands.

16.2 As early as possible, the First Nation Council forwards to the Department a BCR which meets the policy requirements in this Directive. This BCR notifies the Department of the proposed surrender or designation. In the BCR, the council should request the holding of a referendum.

16.3 The lands officer prepares the Ministerial Order calling a referendum and submits it for ministerial approval. This Ministerial Order will also include the appointment of the electoral officer who oversees the referendum or meeting.

16.4 If a change has to be made to the Ministerial Order for any reason, the lands officer will prepare a second Ministerial Order for approval. This must be completed before the applicable notice period begins.

16.5 The lands officer will:

- a) discuss the general parameters of the proposal and the process in detail with the First Nation Council;
- b) provide relevant information in the Department's knowledge and possession to the First Nation Council. This includes information about encumbrances, use, the results of any environmental assessment, and any development or investment proposals other than the one being considered;
- c) recommend that the First Nation seek independent legal and other professional advice (such as financial, marketing, geological, etc.);

- d) where a First Nation refuses to obtain such advice, obtain a BCR from the First Nation Council waiving the need for such advice and stating the reason(s) for refusal;
  - e) prepare the draft Absolute Surrender or Designation document and other documentation;
  - f) assist the First Nation Council in preparing an Information Document. The Information Document must contain sufficient detail to allow the First Nation electors to make an informed decision about the proposal;
  - g) review the Information Document and information provided to the First Nation by the developer or the First Nation's independent advisors. This review is to ensure that the document meets the minimum requirements and the information is complete and accurate;
  - h) inform the First Nation Council that at least one information meeting must take place before the surrender or designation vote and must be at least 14 days after the Notice of Referendum has been posted;
  - i) inform the First Nation Council that the Notice of Referendum must be posted at least 42 days before the day of the referendum;
  - j) arrange for any necessary interpreters; and
  - k) provide any other assistance requested by the First Nation.
- 16.6 The lands officer will revise documentation as necessary or suggest revisions to the First Nation.
- 16.7 The First Nation Council advises the Department of the date of the information meeting(s).
- 16.8 The electoral officer posts the Notice of Referendum at least 42 days before the referendum.
- 16.9 The electoral officer posts the following with the Notice of Referendum:
- a) a copy of the Information Document, where possible, or notice of how and where copies will be made available to individual members, e.g. at the First Nation Council office or in household mailings; and
  - b) the signed list of electors.



- 16.10 The First Nation Council holds the information meeting(s), during which they discuss the Information Document with the electors. At the discretion of the First Nation Council, the lands officer or any of the First Nation's independent advisors attend the meeting. The electoral officer must attend at least one meeting.
- 16.11 Either a departmental representative attends the information meeting and takes minutes, or the First Nation Council forwards a certified copy of the minutes to the lands officer.
- 16.12 The electoral officer carries out the vote and certifies the result according to the procedures set out in the *Referendum Regulations*.
- 16.13 If the vote has been successful, the Absolute Surrender or Designation document is signed by the Chief and Council of the First Nation. The electoral officer, and either the Chief or a Councillor of the First Nation, certify, according to section 40 of the *Indian Act*, that the First Nation has assented to the Absolute Surrender or Designation.
- 16.14 Where the First Nation electors do not consent to a proposed surrender or designation, the lands officer documents the result of the vote and the reason(s) that the surrender or designation proposal failed.
- 16.15 Where the vote fails because a majority of eligible electors did not vote, but a majority of those electors who did vote cast their ballot in favour of the proposed surrender or designation, and the First Nation Council wants to hold a second vote under the terms of subsection 39(2) of the *Indian Act* and subsection 30(1) of the *Referendum Regulations*, as applicable:
- a) the First Nation Council submits a BCR requesting a second referendum;
  - b) the lands officer determines whether the terms for holding a second referendum have been met;
  - c) if the terms have been met, the Minister may, on the recommendation of the Regional Director General (or equivalent), order a second referendum; and,
  - d) another information meeting may be held.

- 16.16 Where a vote at a first referendum fails but does not meet the criteria set out in subsection 39(2) of the *Indian Act* or subsection 30(1) of the *Referendum Regulations* for holding a second referendum, or where a second vote fails, the situation is reviewed to decide whether a subsequent "first" vote will be held (see Section 13 of this Directive).
- 16.17 Following a successful vote, the lands officer prepares a submission recommending acceptance of the surrender or designation. The submission must meet the policy requirements of this directive (see Section 14 of this Directive).
- 16.18 The lands officer ensures that all documents required by this directive are prepared and executed by the correct party.
- 16.19 The lands officer prepares a submission recommending acceptance of the surrender or designation and forwards the submission to the Department Headquarters (see chapter 13 of this Manual).
- 16.20 The lands officer advises the First Nation Council of the acceptance or rejection of the surrender or designation as soon as possible.
- 16.21 Where the surrender or designation is accepted, it is registered in the Indian Lands Registry.
- 16.22 The electoral officer ensures that the *Referendum Regulations* are followed in depositing and destroying ballots.

## 17. References

- 17.1 For more information you should refer to:
- a) Chapter 13 of this Manual for information on preparing submissions recommending acceptance;
  - b) the *Referendum Regulations* for a comprehensive understanding of the process for holding a referendum;
  - c) Indian Lands Registration Manual.

**Chapter 5**

**Directive 5 - 4**

**How to Surrender or  
Designate Reserve Lands by Referendum**

**Annex A : Sample Designation**

**Document for Governor**

**in Council Approval**

# DESIGNATION DOCUMENT (with or without lease attached)

## WHEREAS:

- A. The \_\_\_\_\_ Indian Reserve No. \_\_\_\_\_ (the "Reserve") in the Province of \_\_\_\_\_ is a reserve within the meaning of the *Indian Act* and has been set apart for the use and benefit of the \_\_\_\_\_ First Nation Band (the "Band"); and
- B. The Band desires that certain lands in the reserve be designated pursuant to subsection 38(2) of the *Indian Act* for the purposes of leasing or granting interests in the lands subject to the terms and conditions set out in this Designation; and
- C. In accordance with the *Indian Act*, this Designation has been assented to by a majority of the electors of the Band.

**WITNESS THAT**, pursuant to subsection 38(2) of the *Indian Act*, the Band hereby designates all of the rights and interests of the Band and its members required to carry out the purposes of this Designation, in that part of the Reserve containing \_\_\_\_\_ hectares ( \_\_\_\_\_ acres), more particularly described as follows:

[add land description]

In the Province of \_\_\_\_\_,

(the "Lands")

Excepting thereout all mines and minerals, whether precious or base, solid, liquid, or gaseous.

**TO HAVE AND TO HOLD** the Lands unto Her Majesty in right of Canada ("Canada") for the term of \_\_\_\_\_ ( ) years that begins upon the acceptance of this Designation by the Governor General in Council;

.../2

**FOR THE FOLLOWING PURPOSES**, namely:

[Describe the purposes and reasons for the Designation, including the nature and details of the lease, to the extent known.

1. Identify the permitted uses of the lands for which an interest is being granted (i.e. commercial, residential development etc.).
  2. Identify the parties to any headless(s), if known.
  3. Identify the rent (market, nominal or specific) or fees to be charged for all of the leases contemplated. If rent is less than market or nominal then a release must appear in the Designation and be voted on by the electors.
- (d) Specify all other terms, conditions and purposes relevant to the Designation.]

**AND FOR THE FURTHER PURPOSES OF** granting such easements, permits, rights-of-way, licences of occupation, covenants or other similar rights or interests and amendments of such interests as may be necessary or ancillary to the purposes set out above;

**AND ON THE CONDITION** that all leases are to be consented to by the Chief and Council of the Band. The Chief and Council of the Band will take reasonable steps to inform all band members of the terms and conditions of the lease(s) issued pursuant to this Designation;

**NOTWITHSTANDING** the term and purposes of this Designation, the Band authorizes the Band Council to revoke this Designation from all or part of the Lands, by way of resolution made in accordance with subsection 2(3)(b) of the *Indian Act*, on the Band's behalf and subject to the approval of the Governor General in Council, provided there are no existing rights or interests, legal or equitable, vested or contingent, granted pursuant to this Designation then in existence on the affected Lands;

**NOTWITHSTANDING** the term and purposes of this Designation, the Band authorizes the Band Council, by way of resolution made in accordance with subsection 2(3)(b) of the *Indian Act*, on the Band's behalf and subject to the approval of the Governor General in Council, to amend this designation for the purpose of correcting a clerical omission, mistake, or manifest error or other minor amendments all of which shall be determined by Canada.

.../3

**AND ON THE CONDITION** that all payments made to Canada, by virtue of any lease, permit, licence or disposition of any interest less than fee simple, be credited to the funds of the Band as Indian moneys.

**IN WITNESS WHERE OF** the undersigned Chief and Councillors have on behalf of the \_\_\_\_\_ First Nation Band set their hands this \_\_\_\_ day of \_\_\_\_\_, 200\_.

**SIGNED AND DELIVERED BY:**

Chief \_\_\_\_\_, the Chief of \_\_\_\_\_ )  
the \_\_\_\_\_ First Nation Band ) \_\_\_\_\_  
(Signature of Chief)

and by:

Councillor \_\_\_\_\_ ) \_\_\_\_\_  
(Signature of Councillor)

Councillor \_\_\_\_\_ ) \_\_\_\_\_  
(Signature of Councillor)

Councillor \_\_\_\_\_ ) \_\_\_\_\_  
(Signature of Councillor)

Councillor \_\_\_\_\_ ) \_\_\_\_\_  
(Signature of Councillor)

Councillor \_\_\_\_\_ ) \_\_\_\_\_  
(Signature of Councillor)

Councillor \_\_\_\_\_ ) \_\_\_\_\_  
(Signature of Councillor)

Councillors of the \_\_\_\_\_ )  
First Nation Band, in the \_\_\_\_\_ )  
presence of: \_\_\_\_\_ )

\_\_\_\_\_) \_\_\_\_\_ )  
(Signature of Witness as to all )  
signatures) \_\_\_\_\_ )

\_\_\_\_\_) \_\_\_\_\_ )  
Name of Witness (Print)

## Directive 5-5

# How to Terminate or Amend a Designation

### 1. Purpose

- 1.1 This Directive provides information on how to revoke or amend a designation.

### 2. General

- 2.1 An absolute surrender cannot be revoked or amended, since the First Nation's interest in the land is extinguished when the Governor in Council accepts the surrender.
- 2.2 A designation may be terminated by operation of law (expiry of the term) or revocation. It may also be amended to change any of its terms.
- 2.3 While the *Indian Act* is silent on the revocation or amendment of designations:
- a) the Governor in Council has the authority to repeal, amend or vary a regulation which it has enacted;
  - b) since an order of the Governor in Council accepting a designation is deemed to be a regulation, the Governor in Council may revoke, amend or vary the order;
  - c) to revoke or amend a designation accepted by the Governor in Council, a First Nation must use the voting process set out in the *Referendum Regulations*.
- 2.4 The revocation or amendment of a designation accepted by the Governor in Council, other than a termination by operation of law (expiry), must be submitted to the Governor in Council for acceptance.

### 3. Authorities

- 3.1 Relevant authorities include:

*Indian Act*, R.S.C. 1985, c. I-5, subsection 39(1) (which is reproduced in Directive 5-1 of this Manual);

31. (4) *Where a power is conferred to make regulations, the power shall be construed as including a power, exercisable in the same manner and subject to the same consent and conditions, if any, to repeal, amend or vary the regulations and make others.*

## 4. Policy

- 4.1 A designation which expires at the end of its term terminates by operation of law. When this occurs:
- a) the First Nation does not have to initiate the process or vote to terminate the designation, since the land automatically becomes available for its use and benefit;
  - b) the termination does not have to be accepted by the Governor in Council or Minister;
  - c) the Department should give the First Nation reasonable written notice of the termination to allow the First Nation to consider economic development or other land use opportunities.
- 4.2 While a designation which has been accepted by the Governor in Council is still in effect, it may be fully or partially revoked or amended to change any of its terms if:
- a) in the case of a partial revocation or amendment, the lands have not been leased under the terms of the designation or, if they have been leased, the lease is modified as required ;
  - b) in the case of a full revocation, no existing rights were granted under the terms of the designation (the Department may consider an exception if the revocation can be made subject to the existing interests);
  - c) depending on the wording of the designation, either the First Nation Council or the eligible electors consent; and,
  - d) the Governor in Council accepts the revocation or amendment.



**EXAMPLE 1  
PARTIAL REVOCATION**

A designation covers a number of parcels in a reserve. Some of these parcels have been leased under the designation, but several others remain unleased. The First Nation Council wishes to allot the unleased land to an individual member for development but cannot do so while the land remains designated. The First Nation Council may request an amendment of the designation to delete the desired parcels from the designation.

- 4.3 The following clause grants the First Nation Council the authority to revoke and/or amend a designation. **Unless the precedent clause outlined in this section or its predecessor for previous designations, is in the designation being revoked or amended, the electors of a First Nation must vote on the proposal:**

**“NOTWITHSTANDING** the term and purposes of this designation, the Band authorizes the Band Council to revoke this designation from all or part of the Lands by way of resolution made in accordance with subsection 2(3)(b) of the *Indian Act*, on the Band’s behalf and subject to the approval of the Governor General in Council provided there are no existing rights or interests, legal or equitable, vested or contingent, granted pursuant to this designation then in existence on the affected Lands”;

**“NOTWITHSTANDING** the term and purposes of this designation, the Band authorizes the Band Council, by way of resolution made in accordance with subsection 2(3)(b) of the *Indian Act*, on the Band’s behalf and subject to the approval of the Governor General in Council, to amend this designation for the purpose of curing or correcting a clerical omission, mistake or manifest error or other minor amendments, all of which shall be determined by Canada”.

- 4.4 A First Nation Council may wish to amend a designation which contains the clause set out in paragraph 4.3 of this Directive. Where this is planned, the Department:
- a) must determine whether the proposed amendment modifies the designation in such a material way that the eligible electors who voted for the designation would not have reasonably contemplated such an amendment; and,

- b) reserves the discretion to require a vote in appropriate circumstances.
- 4.5 Since having a clause which allows a First Nation Council to request a revocation or amendment is beneficial, the lands officer must:
- a) inform the First Nation Council that the designation may include the clause set out in paragraph 4.3 of this Directive;
  - b) inform the First Nation Council that, should they so wish, the clause may be worded to allow only for the revocation (either fully or partially), but not the amendment, of the terms of the designation;
  - c) inform the First Nation Council that where the clause set out in paragraph 4.3 of this Directive exists and the First Nation Council intends to amend any material term(s), the department will apply the policy set out in paragraph 4.4 of this Directive; and,
  - d) ensure that the Information Document for the designation clearly explains the scope of the First Nation Council's authority granted under the clause set out in paragraph 4.3. of this Directive
- 4.6 Where a vote is necessary to revoke or amend a designation:
- a) the lands officer must search the Indian Lands Registry to identify any outstanding rights (including oil and gas interests) in the land concerned;
  - b) the lands officer must reasonably determine whether any pending agreements affecting the land in question have not yet been registered in the Indian Lands Registry;
  - c) the First Nation will vote using the *Referendum Regulations*;
  - d) statutory and policy requirements must be strictly followed, such as the appointment of an electoral or designated departmental officer, proper notice, posting of an elector's list, preparation of an Information Document, holding of an information meeting, required consent of the electors, certification of the revocation or amendment, etc. (see Directive 5-4 of this Manual); and

- e) the lands officer must ensure that the First Nation Council explains the nature of the revocation or amendment, including the reasons behind the proposal, in the Information Document.
- 4.7 The First Nation may vote on a revocation (either full or partial) and a new designation simultaneously. Where a simultaneous vote is planned, the lands officer must ensure that the First Nation Council outlines the dual purpose of the vote in the Information Document and that they will put two clearly distinguishable questions to the electors.
- 4.8 The documentation used in a designation is also used for the revocation or amendment of a designation, with necessary modifications (see Directive 5-4 of this Manual).

## 5. Process

- 5.1 This section provides an overview of the process to revoke or amend a designation of reserve lands.
- 5.2 Where a designation terminates by operation of law (expires), the lands officer gives the First Nation Council reasonable written notice of the termination. This written notice will ensure that the First Nation Council can consider economic development or other land use opportunities.
- 5.3 Where a vote is necessary to revoke or amend a designation:
- a) the First Nation Council submits a Band Council Resolution (BCR) stating it wishes to revoke or amend a designation and requests a referendum;
  - b) the lands officer searches the Indian Lands Registry to identify any outstanding rights (including oil and gas interests) in the land concerned;
  - c) the lands officer reasonably determines whether any pending agreements affecting the land in question exist which have not yet been registered in the Indian Lands Registry;

- d) the Department follows the statutory and policy requirements set out in the *Indian Act*, claims implementation acts, the *Referendum Regulations* and this Chapter, such as the appointment of an electoral officer, proper notice, posting of an electors list, preparation of an Information Document, holding an information meeting, required consent of the electors, certification of the revocation or amendment, preparation of various statements, etc. (see Directive 5-4);
  - e) the lands officer prepares and submits a submission recommending the revocation or amendment;
  - f) the lands officer notifies the First Nation about whether or not the revocation or amendment has been accepted; and
  - g) if the revocation or amendment is accepted, the lands officer submits the Revocation or Amendment of Designation document and the order accepting the revocation or amendment for registration in the Indian Lands Registry.
- 5.4 Where a First Nation Council is relying on the precedent clause set out in paragraph 4.3 of this Directive to request the revocation or amendment without a vote:
- a) the First Nation Council submits a copy of the approved designation document containing the clause along with a BCR requesting the revocation or amendment;
  - b) the lands officer verifies that the required quorum of the First Nation Council has voted on and executed the BCR;
  - c) the lands officer ensures that the wording of the clause gives the First Nation Council the authority to request a revocation or amendment without a vote;
  - d) the lands officer reviews the amendment or revocation for any potential problems;
  - e) the lands officer searches the Indian Lands Registry to identify any outstanding rights (including oil and gas interests) in the land concerned;

- f) the lands officer reasonably determines whether any pending agreements affecting the land in question exist which have not yet been registered in the Indian Lands Registry;
- g) the lands officer prepares and submits a submission recommending acceptance of the revocation or amendment;
- h) the lands officer notifies the First Nation about whether or not the revocation or amendment has been accepted; and
- i) if the revocation or amendment is accepted, the lands officer registers the Revocation or Amendment of Designation document and the order accepting the revocation or amendment in the Indian Lands Registry.

## 6. References

6.1 For further information you should refer to:

- a) Chapter 10 of this Manual for information on returning unsold surrendered land to reserve status under the Additions to Reserve policy;
- b) Chapter 13 of this Manual for information on preparing submissions recommending acceptance;
- c) Indian Lands Registration Manual.

## INDEX TO CHAPTER 6

### PERMITS: DRAFTING, ISSUING AND CANCELLING

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# Directive 6-1

## Permits - General

### 1. Purpose

- 1.1 This directive provides general information on the drafting, issuance and cancellation of all permits over reserve lands. The directives which follow in this chapter discuss the specific kinds of permits used and the unique policy and procedural concerns which may apply to them.

### 2. General

- 2.1 A permit allows the permittee to use and occupy specific reserve land by authorizing a limited interest in land for a limited time. For permits issued on reserve land, the Permitter is the federal Crown.
- 2.2 A permit has the following characteristics:
- a) it does not grant exclusive possession of land;
  - b) it may grant a limited interest in reserve land, such as an easement (as with hydro utilities), although it may give a lesser use (such as cattle grazing);
  - c) the term is usually short, but may be for longer periods so long as the term is able to be clearly determined.
- 2.3 Departmental staff must ensure that the permit process complies with the policy and procedure contained in this chapter. In addition, lands officers should carefully document all government dealings with the First Nation and the permittee.
- 2.4 The following kinds of permits are issued under the *Indian Act*:
- a) permits for the use and occupation of non-designated reserve lands issued under ss. 28(2) (see Directive 6-2);
  - b) permits for the removal of sand, gravel, clay and other nonmetallic substances issued under ss. 58(4) (see Directive 6-4);



- c) permits issued to other government departments as memoranda of understanding (MOUs) or letter permits under the authority conferred by subsection 28(2) of the *Indian Act* (see Directive 6-3); and
- d) permits issued under ss. 53(1) pursuant to designations.

### 3. Authorities

3.1 Permits may be issued under ss. 28(2), ss. 53 (1), or ss. 58(4), of the *Indian Act*.

3.2 Subsection 28(2) of the *Indian Act* states that:

*28(2) The Minister may by permit in writing authorize any person for a period not exceeding one year, or with the consent of the council of the band for any longer period, to occupy or use a reserve or to reside or otherwise exercise rights on a reserve.*

3.3 Subsection 53(1) of the *Indian Act* states that:

*53(1) The Minister or a person appointed by the Minister for the purpose may, in accordance with this Act and the terms of the absolute surrender or designation, as the case may be,*

- (a) manage or sell absolutely surrendered lands; or*
- (b) manage, lease or carry out any other transaction affecting designated lands.*

3.4 Subsection 58(4) of the *Indian Act* states that:

*58(4) Notwithstanding anything in this Act, the Minister may, without an absolute surrender or a designation*

- (a) dispose of wild grass or dead or fallen timber; and*
- (b) with the consent of the council of the band, dispose of sand, gravel, clay and other non-metallic substances on or under lands in a reserve, or, where that consent cannot be obtained without undue difficulty or delay, may issue temporary permits for the taking of sand, gravel, clay and other non-metallic substances on or under lands in a reserve, renewable only with the consent of the council of the band.*

## 4. Policy

- 4.1 The consent of the First Nation council must be obtained before the granting of any permit.
- 4.2 Prior to the commencement of negotiations, the lands officer advises the First Nation council and the prospective permittee that:
- a) the permit cannot grant exclusive possession and the rights given must be consistent with the permitted use given;
  - b) the permit may contain specific authority for cancellation by the Minister, particularly where the permit gives only a licence;
  - c) compensation for permits is based at a minimum on fair market value, paid as fees, and must be reviewed at intervals not exceeding five years;
  - d) an environmental assessment of a project according to the *Canadian Environmental Assessment Act (CEAA)* is required before issuing a permit for the purposes of enabling a project to be carried out in whole or in part (see Chapter 12 of this manual for more information).
- 4.3 Since a permit does not grant exclusive possession, more than one permit for a parcel of land may be issued to different parties or the same party for different purposes, as long as the uses do not conflict.
- 4.4 Permits for the use and occupation of reserve lands must contain certain provisions. Many of these provisions are mandatory and contain wording which is non-negotiable. Other provisions may be open to negotiation on the way they are dealt with in the contract. Further, depending on the use, other optional provisions may also be included to fit the particular situation. Annex A contains a description of many of these provisions.
- 4.5 In rare circumstances, an interim use and occupation permit may be issued under ss. 28(2) as a preliminary step in the taking of lands for public purposes under section 35 or the designation of lands under section 38. Refer to Chapter 9 for further information.
- 4.6 Refer to Chapter 8 for information on monitoring and compliance.

- 4.7 The permit should contain provisions for the cancellation of the contract for breach of its terms. It should, however, be noted that the cancellation of a permit is a serious step which must not be undertaken without first consulting with the Department of Justice Legal Services (DOJ), the First Nation, and/or the locatee.
- 4.8 Cancellation of the permit may be appropriate when:
- a) the permittee has failed to pay the fees due under the permit;
  - b) the permittee has failed to observe covenants set out in the permit;
  - c) the control or ownership of a permittee has changed and there are no provisions for assignment; or,
  - d) the permittee has died and there are no provisions for assignment.
- 4.9 If the Region has determined, after consultation with DOJ, that there are valid grounds to cancel a permit, it must consult with the First Nation before making a decision. The views of the First Nation and/or the locatee should be confirmed in writing.
- 4.10 A permit may only be relinquished with the consent of the First Nation council and the approval of the Minister.

## 5. Process

- 5.1 This section provides an overview of the permit process. Refer to Annex B for a detailed procedural checklist.
- 5.2 **Preliminary Steps:** Before initiating the permit process, the following procedural steps must be completed:
- a) confirm that the proposed use falls within the scope of the statutory authority being relied upon (ss. 28(2), ss 53(1) or ss. 58(4)) of the *Indian Act*;

**Preliminary Steps (continued)**

- b) brief the First Nation council and the permittee on the scope of the permit and the mandatory provisions. The First Nation council and the proposed permittee (proponent) should be provided with a copy of the permit applicable to the proposed use. If a *CEAA* environmental assessment has been conducted and mitigation is required, additional wording or clauses should be added before the draft permit is sent to the proponent. If you are at a preliminary discussion point, both the FN and the proposed proponent should be aware that additional clauses could be added if during review of the *CEAA* assessment or during negotiations other concerns arise.
  - c) the proposed permittee pays for and performs an assessment of the environmental effects of the project, according to the *CEAA* and its regulations. The responsible officer must ensure that a screening of the project is done and that an environmental assessment decision is made as required by the *CEAA* (see Chapter 12 of this Manual for additional information);
  - d) conduct a search to ensure that there are no previous conflicting encumbrances on the subject lands. If a conflicting use exists, obtain the written consent of the prior encumbrance holder and a written recommendation from the First Nation council (i.e. BCR);
  - e) the First Nation council and/or the locatee may negotiate the terms of the permit with the proponent. These terms would include fee, location, period, but substantial changes to the language in the document, must be reviewed by DOJ. It is, therefore, recommended that the First Nation and/or the locatee keep the department apprised of their negotiations. The federal Crown is the permittor and will have the ultimate decision as to whether or not the proposed terms are acceptable;
  - f) obtain a band council resolution (BCR) from the First Nation council requesting that the Minister issue the proposed permit pursuant to the applicable statutory authority.
- 5.3 **Drafting:** Draft the permit using standard documentation and clauses, i.e. Departmentally approved standard forms. Land management officers should consult with DOJ when the standard clauses or approved forms are inappropriate for a particular situation.

5.4 **Issuing:** The following steps are involved in issuing a permit:

- a) review the draft permit for necessary terms and conditions and compliance with policy requirements;
- b) obtain an appraisal report where appropriate, and have it reviewed by Public Works and Government Services Canada, when required, to confirm that the permit compensation is, at a minimum, fair market value;
- c) submit the draft permit to DOJ for review where appropriate;
- d) the permittee executes the permit and the authorized regional officer executes the permit;
- e) register the executed permit in the Indian Land Registry and the Environmental Assessment in the Federal Environmental Assessment Index;
- f) the registered permit is sent to the permittee, the First Nation and, if applicable, the locatee(s)

5.5 **Monitoring and Compliance:** Refer to Chapter 8 for procedure relating to monitoring and compliance.

5.6 **Cancellation:** The cancellation procedure for a permit is similar to the procedure for cancellation of leases set out in Chapter 7-7. These steps can be summarized as follows:

- a) verify the facts respecting the grounds for cancellation;
- b) confirm whether there are provisions in the permit to address the breach ;
- c) obtain the First Nation's (including Locatee's where applicable) views of the proposed cancellation in writing;
- d) consult with Department of Justice (DOJ);
- e) the officer authorized under the current regional delegation of *Indian Act* authority, or the First Nation if it is exercising land management powers, gives the permittee notice of the default by registered mail. The notice should set out specific details of the default and give the permittee a deadline within which to remedy the situation;

**Cancellation (continued)**

- f) verify whether the permittee has cured the default before the deadline given;
- g) the regional office sends the permittee, by registered mail, a cancellation notice. The notice is signed by the officer exercising the Minister's delegated authority under the current delegation of the *Indian Act* authority. A copy of the notice must also be sent to the First Nation (including locatees where applicable);
- h) conduct follow-up steps to ensure the permittee has vacated the land and complied with any outstanding permit obligations, such as any decommissioning measures identified in the permit;
- i) register the notice of cancellation with the Indian Lands Registry.

**6. Implementation**

- 6.1 This chapter replaces previous policy directives dealing with this subject matter and will come into force upon distribution.

**7. References**

- 7.1 Besides the *Indian Act*, you may want to consult:
- a) the Indian Lands Registration Manual;
  - b) the Minerals Policy and Procedures Manual;
  - c) Chapter 12 of this Manual;
  - d) *CEAA* and regulations; or
  - e) *CEAA's Responsible Authority Guide* (November 1994).



**Chapter 6**

**Directive 6-1: Permits - General**

**Annex A: Permit Provisions**





# Annex A

## Permit Provisions

### 1. General

- 1.1 Permits for the use and occupation of reserve lands must contain certain provisions. Many of these provisions are mandatory and contain wording which is non-negotiable. Other provisions are mandatory, but the manner in which they are dealt with may be open to negotiation. Other optional provisions may also be included to fit the particular situation.

### 2. Mandatory Provisions

- 2.1 The following provisions should be addressed when drafting a permit or amending a departmentally approved standard permit:
- a) **Corporate Status:** A corporate entity must show, by submission of the current year's documentary evidence, that it is in good standing, ie: a "Certificate of Good Standing", under the provincial or federal legislation governing its status.
  - b) **Land Status:** The status of the proposed permit area must be such that the Minister has authority to deal with it in the proposed manner.
  - c) **Registration:** All permits must be submitted to the Registrar of Indian Lands for registration.
  - d) **Indemnification:** The permittee must indemnify and hold harmless the Crown against all costs, claims and demands arising from the permittee's activities on the reserve.
  - e) **Taxes:** The permittee must agree to pay all taxes, levies, etc. payable to any authority because of its use and occupation of reserve land.
  - f) **Compliance with Laws:** The permittee must agree to comply with all applicable federal, provincial or municipal laws, bylaws, rules, regulations, ordinances, First Nation bylaws or other relevant standards, including CEPA, CEAA, the *Fisheries Act* and any other laws related to environmental protection.

**Mandatory Provisions (continued)**

- g) **Mineral, Oil and Gas Rights:** The Crown reserves the right to search for, remove and dispose of all minerals, oil and gas to be found in, upon or under the reserve lands, except to the extent that the removal or disposal of nonmetallic minerals has been dealt with in a ss. 58(4) permit.
- h) **Authority:** The permit must refer to the statutory provision under which it is issued. **Note:** Where a First Nation is exercising s. 53 or s. 60 land management authority, the particulars of the Order in Council or Ministerial Letter, with the *Indian Act* authority, should be recited.
- i) **Band Council Resolution (BCR):** The permit must recite and reference the BCR approving the permit application.
- j) **Locatee:** The permit must recite and reference the name of the locatee, their band number and the registration number of their Certificate of Possession; if applicable.
- k) **Access:** The permit must provide reasonable access to the Minister or any person duly authorized by him or her to examine the operations on the premises.
- l) **Artifacts:** The permittee must agree to report finds of a historical, anthropological or cultural nature to the First Nation and to cease all activities on the permit area in which the articles are discovered until further notice.
- m) **Parties:** The permit must clearly identify the parties. The permit will set out the full legal name of the permittee, designation of signing officer and the permittee's address. Corporate permittees should also include the jurisdiction of incorporation and the instrument authorizing the entering into of land transactions.
- n) **Land Description:** A full, identifiable description must be included and it must conform with the requirements of the current Interdepartmental Agreement Respecting Legal Descriptions on Indian Lands.
- o) **Term:** Set out the commencement date of the permit, the length of time and the termination date.

**Mandatory Provisions (continued)**

- p) **Compensation:** At a minimum, compensation must reflect fair market value. Set out the amount and the period of payment (e.g. weekly, monthly, annually, etc.). Where the compensation depends on a calculation, the permit must include specific instructions defining the method of calculation. The permit should specify compensation review periods, which must occur at least every five years. If the compensation is less than fair market value, Band Council and/or locatee consent must reflect this. Canada may wish to obtain a certificate of independent legal advice from the Band Council to ensure that the decision to accept less than fair market value is a fully informed decision. Further, Canada may wish to seek a release from the Band Council, releasing Canada from any and all claims that could arise from the granting of a permit for less than fair market value.
- q) **Use:** The permit must clearly define the allowable use of the permit area. Prohibited uses may be specified where appropriate.
- r) **Notice Addresses:** The permit should identify addresses for giving notice to the parties.
- s) **Maintenance:** The permit should identify standards of maintenance, including provision for dangerous objects, noxious weeds, rubbish, waste and nuisance where appropriate.
- t) **Cancellation:** The permit must specify those actions or defaults which may result in its cancellation, without restricting the Crown's right to cancel the permit at will.
- u) **Default:** The permit must provide that, upon default, compensation due and payable are collectable.
- v) **Insurance:** The permit must include an undertaking by the permittee to maintain public liability insurance and if applicable, fire insurance for 100% replacement. The permittee must also ensure that Her Majesty is a named insured on the policies.

**2.2 Optional Provisions:**

- a) **Standards:** The permit should identify governing construction, health and safety standards. Provision should also be made for resolving conflicts between standards, who will inspect, who pays for inspections and remedies for failure to meet standards.

## Optional Provisions (continued)

- b) **Performance Requirements:** Performance requirements should be set out with provisions for inspections, reporting and remedies for noncompliance.
- c) **Fencing:** Fences and locks are only acceptable on permit areas where appropriate (i.e. for safety and security reasons, or for agricultural grazing purposes).
- d) **Damages:** Provision should be made for a remedy for damage caused to the reserve lands by the permittee.
- e) **Improvements:** The permit should identify who owns any improvements made to the land after termination of the permit.
- f) **Dispute Resolution:** The permit may specify a dispute resolution mechanism to resolve disagreements between the parties regarding the application of the permit provisions.
- g) **Fisheries Protection:** If the operations of the permittee may affect any fish bearing stream or water body, the permittee may be required to undertake specific protective measures or obtain a permit or prior approval from the Department of Environment and Resource Management or Department of Fisheries and Oceans.
- h) **Miscellaneous provisions:** when the Permit area has other permissible uses under other registered instruments or permits, they should be referred to in the new permit.
- i) **Assignment provisions:** if there is to be an option for the assignment of the permit, the Lands Officer, with the assistance of DOJ if required, should include the mechanism for that provision, preferably using a previously approved departmental precedent.
- j) **Park Royal Clauses**

The Permittee and the Minister mutually covenant and agree that this Permit is given under section 28(2) of the *Indian Act* and the rights given hereby shall be construed as a licence only and shall not be deemed to grant, convey or confer on the Permittee any right "*in rem*" or any estate or interest in the title to the land.

**Park Royal Clauses (continued)**

Notwithstanding anything in this Permit contained, the Permittee on behalf of itself, its officers, servants, agents, tenants, licensees and invitees acknowledges and agrees that this Permit does not confer or give rise to any greater right or rights upon the Permittee, its officers, servants, agents, licensees and invitees than the Minister is authorized to confer by section 28(2) of the *Indian Act*.



**Chapter 6: Drafting, Issuing and Cancellation of Permits**

**Directive 6-1: Permits - General**

**Annex B:**

**Detailed Checklist**





## Annex B Detailed Checklist

1.	The Lands Officer verifies that the proposed use is one which is consistent with the nonexclusive use of reserve land and is otherwise appropriate for the statutory authority under which the permit will be issued (see Chapter 2, Directive 2-2).	
2.	The Lands Officer conducts an abstract search to identify all interests which the proposed permit will affect.	
3.	<p>The First Nation council issues a BCR to INAC Field which should include the following:</p> <ul style="list-style-type: none"> <li>a) a description of the permit area in the manner prescribed by the Interdepartmental Agreement Respecting Legal Descriptions of Indian Lands, as amended from time to time;</li> <li>b) proof of a locatee's consent to the permit, when the permit area includes land in the lawful possession of an individual locatee;</li> <li>c) the proposed use should be clearly identified;</li> <li>d) the term of the permit;</li> <li>e) the permit compensation;</li> <li>f) a request that the Minister issue a permit pursuant to the appropriate <i>Indian Act</i> provision;</li> </ul>	

4.	The Lands Officer ensures that an environmental assessment has been conducted under the CEAA, where required.	
5.	The Lands Officer verifies that the permit compensation is at a minimum fair market value. This may involve an Appraisal Report which is provided by the proponent and reviewed by Public Works and Government Services Canada. If the First Nation Council has knowingly agreed to a value less than the fair market value, the Department should obtain a written acknowledgement from the First Nation which may include a Certificate of Independent Legal Advice and a release of claims pertaining to the compensation.	
6.	When provisions are negotiated and changes are made to a precedent document, the Lands Officer must determine if the changes require the review of DOJ.	

**Note: Items 7 and 8 apply only to regions with Field Offices. Those provinces that have only the Region, disregard.**

7.	<p>INAC Field Office issues a Letter of Recommendation to the Region:</p> <ul style="list-style-type: none"> <li>a) describing the proposed transaction;</li> <li>b) recommending the issuance of a permit;</li> <li>c) attaching BCR;</li> <li>d) attaching the draft permit.</li> </ul> <p><b>Note:</b> If the delegation rests with the Field Office go to step 8 and substitute Field Office for Region.</p>	
8.	Region reviews the draft permit to ensure that the permit includes the mandatory provisions (and any appropriate optional provisions) set out in Annex A to this directive. If there are substantial changes to the standard permit it would be reviewed by DOJ; see Directive 6-3, Section 5.2.	

9.	The Lands Officer forwards four (4) copies of the permit to the permittee for execution.	
10.	The Lands Officer receives the executed copies of the permit from the permittee.	
11.	The departmental officer, authorized to execute the permit under the current regional delegation of <i>Indian Act</i> authorities or the First Nation, if it is exercising land management powers and are authorized by their Order, will execute the original copies of the permit.	
12.	The Lands Officer sends an executed original of the permit to the Indian Lands Registry for registration, with the original BCR, Locatee consent (if applicable), a sketch of the subject area (if applicable), acknowledgement of corporation (if applicable) along with any other documentation which supports or is referred to in the Permit.	
13.	The Lands Officer receives registration particulars from the Indian Lands Registry.	
14.	INAC Field Office sends an executed original of the permit to the permittee and the First Nation, with the particulars of registration endorsed thereon. If applicable, a copy should be sent to the locatee(s) and a copy kept in the Lands Officer's file.	

## Directive 6-2

### Subsection 28(2) Permits

#### 1. Purpose

- 1.1 This directive discusses the nature and scope of ss. 28(2) permits and the unique policy considerations applicable to them. The agricultural permit is discussed as one example of a ss. 28(2) permit.

#### 2. General

- 2.1 A ss. 28(2) permit is the general permit for the non-exclusive use and occupation of reserve lands.
- 2.2 Review Directive 6-1 for general information applicable to ss. 28(2) permits.

#### 3. Authorities

- 3.1 Subsection 28(2) of the *Indian Act* states that:

*28(2) The Minister may by permit in writing authorize any person for a period not exceeding one year, or with the consent of the council of the band for any longer period, to occupy or use a reserve or to reside or otherwise exercise rights on a reserve.*

#### 4. Policy

- 4.1 Refer to Directive 6-1 for the general policy principles applicable to ss. 28(2) permits.
- 4.2 The Supreme Court of Canada in *Opetchesaht v. B.C. Hydro and the Queen* addressed the legal nature of a subsection 28(2) permit. The permit can grant a limited interest in land for a limited period of time.
- 4.3 **Interest in Land**
- a) The ss. 28(2) permit can be used to grant an interest in land to the permittee. Such interest has to be limited and cannot amount to exclusive possession;

**Interest in Land (continued)**

- b) Where an exclusive interest in land is determined to be unnecessary, a ss. 28(2) permit should be used;
- c) Permits are used for easements. When a permit is used for utility lines, the easement can be granted regardless of whether the utility line services the reserve (distribution line) or only crosses it (transmission line). In these circumstances compensation is reflected accordingly;
- d) Consult with DOJ and the Lands Directorate at Headquarters if it is not clear whether the use contemplated is one authorized by ss. 28(2), particularly if exclusive possession is in any way contemplated;

**4.4 Less than an Interest in Land**

Although it is understood that permits do not grant exclusive use, in some cases the use does not require any interest in the land. In these cases, the Lands Officer should ensure that the permit only authorizes those rights actually needed by the permittee.

**4.5 Duration of Permit**

- a) Where possible, the duration of ss. 28(2) permits should have a defined period of years, months, etc. However, it is possible for a ss. 28(2) permit to have an indeterminate period so long as the termination of the permit is defined by the happening of a reasonably determinable event. In the *Opetchesaht* case, the Supreme Court found that "a period of time required for the purpose of an electric power transmission line constituted such a determinable event." For permits with an indeterminate term, we generally use the language "for as long as required".
- b) The duration of a ss. 28(2) permit is best kept as short as possible depending on the particular circumstances with the consent of the First Nation council.

**4.6 Non-Permissible Uses**

The ss. 28(2) permit is not available when what is contemplated is a sale, disposition, long term lease or alienations permanently disposing of any Indian interest in reserve land. For these a surrender or designation is required. (See Chapter 7).

#### 4.7 Assignment

- a) The ability to assign a subsection 28(2) permit must be considered on a case by case basis taking into consideration the circumstances and nature of the interest being granted. For example, a subsection 28(2) permit granted to a Crown entity, including other departments and provinces would not be assignable. Generally, permits that do not grant an interest in land are not assignable.
  - b) When a subsection 28(2) permit can be assigned that assignment must be subject to the written consent of the Minister.
- 4.8 Long-term permits with prepaid compensation should be avoided. Permits for any term length should have periodic review of compensation based on market value. Short terms are preferable, but this should be worked out on a case by case basis in consultation with the First Nation.
- 4.9 In the case where pre-payment is preferred by the First Nation and has been stated as such in a letter or BCR from the First Nation, a Certificate of Independent Legal Advice should be obtained from the First Nation, as well as a release of claims pertaining to the pre-payment of the permit.

### 5. Locatee Lands

- 5.1 The preferred authority for granting a right of use and occupation over locatee lands is a locatee lease under ss. 58(3). Refer to Directive 7-3. However, a general ss. 28(2) permit may involve locatee lands where the permit benefits the First Nation members as a whole, interference with the locatee's interest is minimal, and the individual locatee has agreed in writing to the granting of the instrument.

### 6. Agricultural Permit

- 6.1 In addition to the permit terms and conditions set out in Annex A of Directive 6-1, an agricultural permit may contain the following provisions:
- a) the specific agricultural use to be permitted;
  - b) the farming and soil conservation practices to be followed by the permittee;
  - c) the crop schedule to be followed;

**Agricultural Permit (continued)**

- d) a general undertaking to comply with any applicable environmental standards;
- e) a provision addressing environmental concerns arising from agricultural use, including any mitigation requirements resulting from the environmental assessment under the *CEAA*;
- f) a recognition that the permittee is solely responsible for controlling any livestock.

## **7. Process**

- 7.1 Refer to Directive 6-1 for the procedural steps involved in issuing a permit.

## **8. Implementation**

- 8.1 This chapter replaces previous policy directives dealing with this subject matter and will come into force upon distribution.

## **9. References**

- 9.1 Besides the *Indian Act*, you may want to consult the Indian Lands Registration Manual.



## **Directive 6-3**

# **Memoranda of Understanding (MOU) and Letter Permits**

### **1. Purpose**

- 1.1 This directive describes the nature and scope of memoranda of understanding (MOUs) and letter permits.

### **2. General**

- 2.1 The information set out in Directive 6-1, including the policy and procedure, applies to memoranda of understanding and letter permits.
- 2.2 The MOU and letter permit are used when the proposed permittee is another department of the federal or provincial Crown.
- 2.3 These kinds of permits serve the same purpose, which is to record the understanding of the terms and conditions upon which the Minister authorizes the use and occupation of reserve lands by another government department.
- 2.4 Letter permits and MOUs differ in form only. MOUs are developed to standardize the terms of particular kinds of commonly used letter permits. For example, standardized MOUs have been prepared for the use and occupation of reserve lands by Health Canada and the RCMP.

### **3. Authorities**

- 3.1 The *Indian Act*, subsection 28(2), is the authority for issuing a letter permit or signing a MOU.

### **4. Policy**

- 4.1 As with any other permit, the consent of the First Nation council is a necessary precondition to the signing of a MOU or the issuance of a letter permit.
- 4.2 It is the policy of the Minister to satisfy all reasonable permit requests from other branches of the federal or provincial governments.

**Policy (continued)**

- 4.3 The terms and conditions set out in Annex A of Directive 6-1 should be reviewed for their applicability when drafting MOUs and letter permits.
- 4.4 A letter permit or MOU should be signed by the permittee and, for the Permitter, by the duly authorized officer pursuant to the current regional delegation of *Indian Act* authorities.

**5. Process**

- 5.1 The procedural steps set out in Annex B to Directive 6-1 apply to memoranda of understanding and letter permits.
- 5.2 MOUs and letter permits should be drafted following existing standards. If the permit deviates from the standards, DOJ may be asked to review the changes and advise of any risk to the crown. HQ should also review for possible policy implications.

**6. Implementation**

- 6.1 This chapter replaces previous policy directives dealing with this subject matter and will come into force upon distribution.

**7. References**

- 7.1 Besides the *Indian Act*, you may want to consult:
- a) Chapter 12 of this Manual
  - b) the Indian Lands Registration Manual

## **Directive 6-4 Disposal Permits (Subsection 58(4))**

### **1. Purpose**

- 1.1 This directive describes the nature and scope of disposal permits issued under ss. 58(4).

### **2. General**

- 2.1 The information set out in Directive 6-1 applies to disposal permits.
- 2.2 A disposal permit is used to authorize the removal of wild grass, dead or fallen timber, sand, gravel, clay or other nonmetallic substances from reserve lands, where the permittee requires short-term use and does not intend to install permanent structures within the permit area.
- 2.3 The removal of natural resources without authorization is an offence under s. 93 of the *Indian Act*.
- 2.4 Cutting live timber from reserve lands requires a permit or licence issued under s.58(4) of the *Indian Act* and the *Indian Timber Regulations*. Refer to the Forestry Policy Manual for further details.
- 2.5 The Minerals Policy and Procedure Manual must be referred to for more information on permits issued under ss. 58(4)(b), for taking and disposing non-metallic substances on reserve lands.
- 2.6 Monies derived from the sale of wild grass, dead or fallen timber, sand, gravel, clay or other nonmetallic substances from reserve lands are to be deposited into the Band Capital account held in Ottawa.

### 3. Authorities

#### 3.1 Section 58(4) of the *Indian Act* provides as follows:

58(4) *Notwithstanding anything in this Act, the Minister may, without an absolute surrender or a designation*

- (a) *dispose of wild grass or dead or fallen timber; and*
- (b) *with the consent of the council of the band, dispose of sand, gravel, clay and other non-metallic substances on or under lands in a reserve, or, where that consent cannot be obtained without undue difficulty or delay, may issue temporary permits for the taking of sand, gravel, clay and other non-metallic substances on or under lands in a reserve, renewable only with the consent of the council of the band.*

### 4. Policy

- 4.1 As with the other permits discussed in this chapter, the approval of the First Nation council is mandatory before a disposal permit will be issued under ss. 58(4).
- 4.2 The removal of materials from reserve lands should be compatible with the long range development plans of the First Nation.
- 4.3 The terms and conditions set out in Annex A of Directive 6-1 apply to disposal permits. In addition, the following terms, described in more detail in the *Minerals Policy and Procedure Manual*, may be included in the permit: surface rental, royalties, performance bonds.
- 4.4 An example of a disposal permit can be found in the *Minerals Policy and Procedures Manual*.

### 5. Process

- 5.1 The steps found in the *Minerals Policy and Procedures Manual* apply to disposal permits.

### 6. Implementation

- 6.1 This chapter replaces previous policy directives dealing with this subject matter and will come into force upon distribution.

## 7. References

7.1 Besides the *Indian Act*, you may want to consult:

- a) Indian Lands Registration Manual;
- b) Minerals Policy and Procedures Manual;
- c) Forestry Policy Manual; or
- d) Chapter 12 of this Manual.

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# Directive 7-1

## Leasing Reserve Land - An Overview

### 1. Purpose

- 1.1 This directive provides general information about leases on reserve lands. It offers an overview of how to lease land, and outlines the types of leases commonly used. Refer to the specific directives within this chapter for detailed information on these issues.

### 2. General

- 2.1 Before reading this chapter, review Chapter 2, which explains how different sections of the *Indian Act* are intended to accomplish different purposes.

Throughout this directive, the phrase "lease document" includes the basic lease agreement itself, and, as appropriate, all other supporting documents and related agreements. The words "must", "shall" or "will" refer to actions that are mandatory. The word "should" refers to actions that are strongly recommended, and the word "may" to actions that are optional.

- 2.2 **Definitions** for the purposes of this chapter:

- a) **Allotted Land** or "**locatee lands**", are reserve lands which the First Nation (FN) Council has validly allotted under the *Indian Act*, the title to which is generally evidenced by a Certificate of Possession (CP). Although the word "locatee" does not appear in the *Indian Act*, it has departmental acceptance to denote the holder of lawful possession.
- b) "**Development Plans**" means the complete and detailed conceptual plans, development plans, as-built plans, design briefs, construction specifications, and cost estimates prepared by an Architect or Engineer, including (without limitation) all site plans drawn to scale and showing the following required features with appropriate dimensions:
- a. boundary lines with dimension and acreage;
  - b. natural and artificial features of subject property and adjacent property, including Improvements;
  - c. "North" arrow;
  - d. title block, including drawing scale, date, developer's name and address and reference numbers;

## Development Plans (continued)

- e. location, dimension, size and construction of roads;
  - f. location, dimension, size and construction specifications of buildings (including number of units, storeys, floor area, number of rooms) as well as dimensions of front, side and back yards;
  - g. location, dimension, size and construction specifications of on-site sanitary sewer connections; and
  - h. location, dimension, size and construction specifications of existing and/or proposed water mains, and any other documents that we reasonably need.
- c) **Land Status Report**, is a report that contains all the pertinent information regarding the encumbrances and/or interests on a particular parcel of reserve land. The report contains information from the Indian Land Registry, if available, and appropriate departmental files. The report identifies existing registered interests such as leases, permits, easements, CPs, or potential encumbrances such as cardex holdings or designations.
- d) **Official Plan or “CLSR Plan”**, is a graphical description of the boundaries of land prepared from field notes of a survey, confirmed pursuant to Section 29, 39, 42, 43, or 44 of the *Canada Lands Survey Act*.
- e) **Registration Plan**, is a graphical description of the boundaries of land prepared from information contained in existing documents, field notes of a survey, controlled aerial photographs or maps, etc. and confirmed pursuant to Section 31 of the *Canada Lands Survey Act*.
- f) **Region** refers to the appropriate regional office, and includes “District” offices;
- g) **Unallotted** “band lands” are reserve lands which the Band Council has not allotted to a locatee. Unallotted land is also known as “common band land.”

2.3 The leasing of reserve land offers First Nations several important benefits. Among these benefits are:

- a) **Increased flexibility in dealing with reserve land:** Unlike an absolute surrender and sale of reserve land, a leasing arrangement allows the First Nation to retain long-term control over the land, subject to the terms and conditions of the lease. This gives the First Nation the flexibility to change or adapt the use of the land over time, according to their needs.



- b) **Maintaining land as part of the reserve:** Because leased land is legally still part of the reserve, the benefits which attach to reserve land are not lost during the term of the lease. For example, First Nation members do not have to pay sales tax on purchases made on the land. As well, First Nation bylaws affecting the leased land will apply to non-Indians.

2.4 **The Legal Framework of Leases:** Leases possess certain legal characteristics which govern the relationship between the lessor (landlord) and the lessee (tenant). Every lease involves:

- a) A grant by the lessor of the **exclusive possession** of land. While the lessor retains the underlying ownership of the land - known as the freehold interest - the lessee is entitled to exclusively occupy the land during the term of the lease. Exclusive occupation is known as the right of possession, which is one right attached to ownership. In essence, the lessor is **temporarily giving to the lessee a part of the rights of ownership** of their land.
- b) A **fixed period of time**, known as **the term**, during which the exclusive possession runs. In the interest of certainty, a lease must include definite commencement and termination dates. A lease that lasts for an uncertain term, or perpetually, could in certain circumstances amount to a grant of the ownership of the land rather than a lease. For example, a lease with a term said to last "for as long as required" is not certain, and the lease therefore, may not be valid.

2.5 A lease made directly between the owner of the land and a lessee is called a **headlease**. A **sub-lease** is created when a lessee in turn leases all or part of their interest in land to a third party. Refer to Directive 7-6: Assignments, Sub-leases and Mortgages for more information on headleases and sub-leases.

2.6 **Specific Types of Leases:** Besides being categorized as a **headlease** or a **sub-lease**, a lease is classified by the type of activity it covers. Every lease includes a variety of provisions which determine the rights and obligations of the parties. While many of these provisions contain standard terms that will be found in every lease, other provisions will vary depending on how the land will be used. For example, a lease of land for use as a cottage property may contain a clause dealing with hunting rights, while one leasing land for use as a shopping centre will not. The three types of standard leases commonly encountered, based on the different uses of land, are:

- a) **Agricultural Lease:** This type of lease is appropriate for the grazing of livestock and the growing of agricultural crops. However, most grazing and cash crop arrangements are now dealt with through the use of s. 28(2) permits. Note that the cutting of timber on reserve land is not

**Agricultural Lease (continued)**

dealt with through leasing, but by means of permits and licenses, issued by the department's Natural Resources officers. Refer to the *Forestry Management Manual* for guidance on timber permits and licenses.

- b) **Commercial Lease:** This type of lease is used when the leased property is intended for commercial or industrial ventures. Commercial activity would include use of the land for a shopping centre, manufacturing facility, restaurant, water or theme park, gas station, retail sales outlet, hotel facility, or mobile home park. The commercial lease is also appropriate for major, multi-family residential projects, such as a condominium, apartment building or subdivision development.
- c) **Residential and Cottage Lease:** This type of lease is designed to reflect the special requirements attached to leasing land for single family use, or for seasonal or year-round cottage recreation.

2.7 **Mandatory provisions:** Most leases contain many provisions dealing with every aspect of the landlord and tenant relationship, because it is in the interest of both parties to know precisely what their obligations are. However, at the very least, every agreement for the leasing of land **must include the following elements:**

- a) **a lessor (landlord) and lessee (tenant).** Because legal title to all reserve lands is vested in the Crown, Her Majesty the Queen in Right of Canada must be the "lessor" in every lease of reserve land, except in the case of a sub-lease. This provision applies even when the Crown has delegated control and management of lands to a particular First Nation under sections 53 or 60 of the *Indian Act*. In these cases, the delegated authority must sign the lease on behalf of the Minister, who represents the Crown. A sub-lease, by its nature, is made between the head lease lessee and a third party sub-lessee and consequently, the Crown is not a party to the sub-lease instrument;
- b) **a legal description of the land or premises (eg. Registration Plan or a CLSR Plan) being leased;**
- c) **the rent to be paid, to whom it is paid, when it is payable and how and when it is to be reviewed;**
- d) **the term of the lease**, stating the date the lease commences and when it terminates; and
- e) **the authorized uses of the land.**

- 2.8 **Implied Covenants:** Beyond these minimum requirements, certain obligations, or covenants, are implied by law to form part of a lease unless the parties have chosen to expressly deal with these obligations in the lease document. If the parties do not deal with these obligations in the lease, then the covenants will bind the parties as if they had agreed to them.
- 2.9 For the landlord, there are three principal implied covenants:
- a) **The tenant's right of quiet enjoyment of the leased premises.** The tenant has the right to be protected against any interference by the landlord with the tenant's use and enjoyment of the premises for the stated purposes.
  - b) **The obligation not to derogate (take away usefulness) from the lease.** The landlord may not use other property in any way that makes the leased premises substantially less fit for the purposes for which they were leased.
  - c) **The obligation to supply premises fit for habitation.** This covenant **only applies** to a lease of furnished premises.
- 2.10 For the tenant, there are four significant implied covenants:
- a) **To pay rent:** Failure to do so may result in forfeiture of possession by the tenant.
  - b) **To act in a tenant-like manner:** In essence, this obligates the tenant to take the action necessary to preserve the state of the property. It does not, however, require the tenant to repair damage caused by wear and tear, or lapse of time.
  - c) **To allow the lessor to enter and view the state of repair of the property;** and
  - d) **To pay all taxes required by law.**
- 2.11 **Joint Tenants and Tenants in Common:** When a lease involves more than one tenant, a joint tenancy or a tenancy in common is created.
- a) A **joint tenancy** is one in which all the tenants hold an equal, undivided, interest in the whole of the lease, and in case of the death of a tenant, the remaining tenants automatically receive the deceased tenant's interest. This is referred to as "right of survivorship". Joint tenancy is not permitted in the Province of Quebec.

**Joint Tenants and Tenants in Common (continued)**

- b) A **tenancy in common** involves two or more tenants, but each tenant may hold a different share of the lease, and there is no right of survivorship. On death, the interest of a tenant in common would pass to his or her estate, not automatically to the other tenants.

2.12 **Leasing Reserve Land.** The leasing of reserve land involves certain basic steps which must be followed to ensure that all leases comply with legal requirements, and also reflect departmental policy. The general framework for leasing is summarized below, with a more detailed guidance on the procedures which must be followed indicated throughout this chapter.

2.13 **Statutory Authority for Leasing Land Under the *Indian Act*.** The provisions which allow leasing of reserve land are found under subsections 53(1)(b), 58(1)(b), 58 (1)(c), and 58(3) of the *Indian Act*. The choice of the appropriate statutory provision will depend on whether the land to be leased is allotted to an individual, whether it is unallotted and the proposed use. Theoretically, lands may also be leased pursuant to subsection 35(3), although this is so rare that it is not dealt with in the Manual.

2.14 **Band Land** may be leased in two ways:

- a) Pursuant to ss. 53(1) of the *Indian Act*, **land designated** under ss. 38(2) may be leased for any purpose that is specified in the designation document. Designated lands include lands designated for the leasing of minerals or oil and gas rights. These leases are issued and monitored by Indian Oil and Gas Canada. The designation of land is most commonly used to facilitate the leasing of reserve land to non-members of the First Nation or a First Nation corporation, for commercial, recreational and residential development. Refer to Directive 7-2: Leasing Reserve Lands Using Designation, for more information on leasing pursuant to ss. 53(1).
- b) **Uncultivated or unused, band land** may be leased for **agricultural or grazing purposes**, for the benefit of the First Nation pursuant to ss. 58(1)(c), although permits under ss. 28(2) are more commonly used for such purposes today. That being said, the use of a lease under ss. 58(1)(c) will be necessary in some circumstances. An example, would be where the agricultural use contemplated required significant capital input for permanent improvements. Consequently, the use of a permit is inappropriate, and a lease arrangement under ss. 58(1)(c) would be more appropriate.

2.15 **Locatee land** may be leased through several mechanisms:

- a) **On the application of the locatee**, land may be leased without being designated, pursuant to ss. 58(3). This is referred to as a **locatee lease**. Refer to Directive 7-3: Locatee Leases, for more information on leasing pursuant to ss. 58(3).
- b) **Uncultivated or unused locatee land** may be leased, with the consent of the Band Council, for **agricultural or grazing purposes**, or for **any purpose that benefits the locatee** (ss. 58(1)(b)). Designation of the land is not required, although the locatee's consent should be obtained. With the increasing use of ss. 28(2) permits, a lease under ss. 58(1)(b) is not commonly used for agricultural purposes.

2.16 **Using ss. 58(1)(c) to Lease Band Land:**

- a) The land to be leased must be either **uncultivated or unused**. At the time the lease is entered into, therefore, the land should be vacant, and not being used for farming, grazing, habitation or other purposes.
- b) The land must be leased for **agricultural or grazing purposes only**;
- c) The **First Nation Council must consent** to the lease. A Band Council Resolution (BCR) or some other form of council consent must be obtained.
- d) The lease must be **for the benefit of the First Nation**.
- e) If the Minister's authority has not been delegated to the First Nation under s. 60, an agricultural or grazing lease **must be approved by the officer who has delegated authority** pursuant to the *Delegation of Authority Instrument* under the *Indian Act* and related Regulations (refer to the relevant regional delegation instrument).

2.17 **Using ss. 58(1)(b) to Lease Locatee Land:**

- a) **Statutory Scheme:** ss. 37(2) of the *Indian Act* states that, "except where otherwise provided for in the *Indian Act*, land in a reserve may not be leased until it has been designated pursuant to ss. 38(2)". Subsection 58(1)(b) allows for the leasing of **uncultivated or unused** locatee land for agricultural and grazing purposes, or for any purpose that is for the benefit of the person in lawful possession. Designation of the land is not required, but the **consent of the Band Council is necessary**.

## Statutory Scheme (continued)

- b) **Division of Proceeds:** ss. 58(2) provides for the division of the proceeds derived from the improvement or cultivation of land under a ss. 58(1)(b) lease. A rent agreed upon between the two parties is to be paid to the individual in possession. The remainder of the proceeds, if any, are to be paid to the credit of the First Nation. Because the *Indian Act* does not specify how the proceeds of locatee leases pursuant to ss. 58(3) are to be divided, the department should advise the locatee of the implications of proceeding by way of a ss. 58(1)(b) lease. Refer to Directive 7-3: Locatee Leases.
- c) **Improvements During the Lease:** If the lessee makes improvements to the land during the term of the lease, it is possible that the value of the improvements may be deducted from the rent paid to the locatee. This recognizes that the locatee will retain the benefits of the improvements after the lease has ended.
- d) **Consent of the First Nation and Locatee:** The *Indian Act* requires that **a lease of land under ss. 58(1)(b) must have the consent of the Band Council**, and ss 58(2) provides that the First Nation receive a share of the proceeds of the lease. A BCR approving a lease under ss. 58(1)(b) should be obtained from the Band Council prior to execution of the lease. Although not specifically required by the *Indian Act*, the locatee's consent should be obtained in writing.  
**Note:**  
Changes to executed leases must be done by way of an executed modification of lease agreement and must include the locatee's consent in writing.
- e) **Approval by the Department:** If the Minister's authority has not been delegated to the First Nation under s. 60, leases authorized by ss. 58(1)(b) must be approved by the departmental officials authorized by the *Delegation of Authority Instrument* under the *Indian Act* and related Regulations (refer to the relevant regional delegation instrument).

2.18 **The Use of Standard Documents:** Approved standard documents, available regionally or from headquarters, are the basis of all leases. Standard documents simplify drafting, allow a faster approval process, help national training programs and produce standardized lease documents for registration purposes. Approved standard documents can subsequently be tailored to the needs of specific situations. Any significant changes should be brought to the attention of Headquarters policy advisors. However, the control of the drafting of these documents rests with the Lands Officer. Changes should always be made in redline and strikeout so that all parties are clear on the language and are clear on the changes from the precedent.

## 2.19 Negotiating Leases

- 2.19.1 **What is Negotiable:** Following basic guidelines, the parties must negotiate key elements in every lease. These elements include the name of the lessee, the rent, the term of the lease, and the proposed use of the land.
- 2.19.2 **Mandatory Terms:** Besides the negotiable items such as rent and term, legislation and departmental policy impose many terms and conditions to be contained in leases of reserve land. These mandatory terms which are contained within approved standard lease forms, deal with most of the standard terms such as insurance, tenant improvements, and construction standards, and are therefore usually not negotiable. Some terms, however, may be unique to each lease, and therefore should be discussed internally before the best course of action can be chosen.
- 2.19.3 **Role of the Lands Officer:** It is the obligation of the Lands Officer to ensure that the department's policy requirements for preparing, executing and registering leases are met.

The First Nation may call upon the Lands Officer to assist in the negotiations with the proposed lessee on the non-mandatory terms of leases. In the interests of fair negotiation, the proposed lessee and any other interested parties should be advised at an early date that the applicable standard lease document will form the basis for the lease. Therefore, the basic terms and conditions of the lease should be conditionally negotiated and inserted into the precedent lease by the Lands Officer. Any changes proposed by a potential lessee or First Nation should be highlighted with redline/strike-out for clarity of the negotiations. Among the terms which should be negotiated at an early stage are:

- a) The **proposed use of the land** (such as commercial, residential, recreational or agricultural) and the specific development or activity planned, should be **clearly** agreed upon. For example, the commercial uses of the land might encompass a retail store, a gas station or a hot dog wagon, and the particular use should be clearly explained.
- b) the proposed **term of the lease**.
- c) the **legal description of the land** to be leased: See Schedule A of the *Framework Agreement between Lands and Trust Services Department of Indian Affairs and Northern Development and Legal Surveys Division, Earth Sciences Sector Natural Resources Canada* as amended from time to time.

## Role of the Lands Officer (continued)

- d) the **proposed rent** (based on an independent appraisal provided by the proposed lessee and reviewed by Public Works & Government Services Canada if required).

**Notes:**

1. Where a s. 53/60 delegation has been made, the First Nation's land manager, employed by the First Nation, handles lease negotiations.
2. The originator of a lease document is always the Lands Officer, or a First Nation with section 53/60 delegation. The Lands Officer should never accept a draft lease from a proponent as a precedent, or starting point of negotiations. Further, any amendments during negotiations must be done by the Lands Officer and **NOT** the proponent or their legal counsel.

2.20 **Transferring the Interest in a Lease:** Unless prohibited by the lease or the terms of a designation, lessees may, with ministerial approval, mortgage, assign, or sublet their leasehold interest. To effectively control the management of reserve land, it is in the interest of First Nations to be able to restrict the transfer of leases, particularly long-term leases to commercial operators. Because they will govern the rights of transfer of a leasehold interest, the lease terms relating to transfer should be carefully reviewed. Where appropriate, amendments to existing leases should be considered. Refer to Directive 7-5: Assignments, Sub-leases and Mortgages for more information on the policies and procedures involved in transferring leases.

2.21 **Cancelling a Lease:** There are circumstances in which cancelling a lease before the end of its term becomes necessary, such as failure by a lessee to remedy a default of the lease, including the non-payment of rent. Refer to Directive 7-6: Cancelling Leases, for information on the policies and procedures involved in cancelling leases. Also, refer to Chapter 8 - Administering Leases and Permits.



### 3. Authorities

#### 3.1 The following provisions of the *Indian Act* are used for the leasing of reserve land:

- 37.(2) *Except where this Act otherwise provides, lands in a reserve shall not be leased nor an interest in them granted until they have been surrendered to Her Majesty pursuant to subsection 38(2) by the band for whose use and benefit in common the reserve was set apart.*
- 38.(2) *A band may, conditionally or unconditionally, designate by way of a surrender to Her Majesty that is not absolute, any right or interest of the band and its members in all or part of a reserve, for the purpose of its being leased or a right or interest therein being granted.*
- 53.(1) *The Minister or a person appointed by the Minister for the purpose may, in accordance with this Act and the terms of the absolute surrender or designation, as the case may be...*
- (b) *manage, lease, or carry out any other transaction affecting designated lands.*
- 58.(1) *Where land in a reserve is uncultivated or unused, the Minister may, with the consent of the council of the band,...*
- (b) *where the land is in the lawful possession of any individual, grant a lease of that land for agricultural or grazing purposes or for any purpose that is for the benefit of the person in possession of the land;*
- (c) *where the land is not in the lawful possession of any individual, grant for the benefit of the band a lease of that land for agricultural or grazing purposes.*
- 58.(2) *Out of the proceeds derived from the improvement or cultivation of lands pursuant to paragraph (1)(b), a reasonable rent shall be paid to the individual in lawful possession of the lands or any part thereof, and the remainder of the proceeds shall be placed to the credit of the band, but if improvements are made on the lands occupied by an individual, the Minister may deduct the value of the improvements from the rent payable to the individual under this subsection.*
- 58.(3) *The Minister may lease for the benefit of any Indian, on application of that Indian for that purpose, the land of which the Indian is lawfully in possession without the land being designated.*

**Authorities (continued)**

59. *The Minister may, with the consent of the council of a band,*
- (a) *reduce or adjust the amount payable to Her Majesty in respect of a transaction affecting absolutely surrendered lands, designated lands or other lands in a reserve or the rate of interest payable thereon; ...*

**4. References**

4.1 For more information, refer to:

- a) Chapter 12 of this Manual for environmental considerations.
- b) *Indian Lands Registration Manual*
- c) Schedule A of the *Framework Agreement between Lands and Trust Services Department of Indian Affairs and Northern Development and Legal Surveys Division, Earth Sciences Sector Natural Resources Canada* as amended from time to time.
- d) *Forestry Management Manual*
- e) Delegation of Authority Instrument for your Region
- f) Canada Lands Survey Act

## Directive 7-2

### Leasing Reserve Lands Using Designation

#### 1. Purpose

- 1.1 This directive explains how to lease unallotted reserve lands that have been designated. The authority for leasing designated land can be found in ss. 53(1) of the *Indian Act*. This directive gives information and guidance about:
- a) **Policy:** The principles and requirements which underlie the use of ss. 53(1).
  - b) **Process:** The steps and procedures involved in using ss. 53(1) to lease unallotted band land.

#### 2. General

- 2.1 **Before Reading This Directive:** Review Directive 7-1: Leasing Reserve Land-An Overview, which will serve as a roadmap for navigating within Chapter 7. Directive 7-1 discusses the legal framework underlying leases, and offers an overview of the leasing mechanisms under the *Indian Act*. Refer also to Chapter 2 - Transaction Guide and to Chapter 5 - Designations and Surrenders.
- 2.2 **How the *Indian Act* Works:** Three key sections of the *Indian Act* authorize the designation and leasing of reserve lands. Sub-section 37(2) states that, except where otherwise provided for in the *Indian Act*, **lands in a reserve may not be leased until they have been designated** pursuant to ss. 38(2). Sub-section 38(2) permits a First Nation to designate its rights or interest in reserve lands for leasing purposes. Lastly, ss. 53(1)(b) authorizes the actual leasing of reserve lands.
- 2.3 **Effect of Designation:** A designation is deemed to confer all the rights that are necessary to carry out its terms. Because reserve land which has been designated remains part of the reserve, the **First Nation's interest in that land survives** throughout the term of the designation.

## 2.4 Negotiating Leases

- 2.4.1 **What is Negotiable:** Following basic guidelines, the parties must negotiate key elements in every lease. These elements include the name of the lessee, the rent, the term of the lease, and the proposed use of the land.
- 2.4.2 **Mandatory Terms:** Besides the negotiable items such as rent and term, legislation and departmental policy impose many terms and conditions to be contained in leases of reserve land. These mandatory terms are contained within our precedent lease forms which deal with most of the standard terms such as insurance, tenant improvements, and construction standards, which are usually not negotiable. Some terms, however, may be unique to each lease, and therefore should be discussed internally before the best course of action can be chosen.
- 2.4.3 **Role of the Lands Officer:** It is the obligation of Lands Officers to ensure that the department's policy requirements for preparing, executing and registering leases are met.

The First Nation may call upon the Lands Officer to assist in the negotiations with the proposed lessee on the non-mandatory terms of leases. In the interests of fair negotiation, the proposed lessee and any other interested parties should be advised at an early date that the applicable standard lease document will form the basis for the lease. Therefore, the basic terms and conditions of the lease should be conditionally negotiated and inserted into the standard lease by the Lands Officer. Any proposed changes by a potential lessee or First Nation should be highlighted with redline/strike-out for clarity of the negotiations. Among the terms which should be negotiated at an early stage are:

- a) The **proposed use of the land** (such as commercial, residential, recreational or agricultural) and the specific development or activity planned, should be clearly agreed upon. For example, the commercial uses of the land might encompass a retail store, a gas station or a hot dog wagon, and the particular use should be clearly explained.
- b) the proposed **term of the lease**.
- c) the **legal description of the land** to be leased Note: a Registration Plan or CLSR Survey is required for most leases. (see Schedule A of the *Framework Agreement between Lands and Trust Services Department of Indian Affairs and Northern Development and Legal Surveys Division, Earth Sciences Sector Natural Resources Canada* as amended from time to time).

- d) the **proposed rent** (based on an independent appraisal provided by the proposed lessee and reviewed by Public Works & Government Services Canada when required).

**Note:** Where a ss. 53(1) delegation has been made, the First Nation's Land Manager, employed by the First Nation, handles lease negotiations.

- 2.4.4 **Guidelines for Commercial, Recreational and Agricultural Leases:** For information on the form, content and negotiation of commercial, recreational and agricultural leases, refer to Directive 7-4: General Guidelines for Drafting Leases and to the specific guidelines attached to Directive 7-4 as Annexes A through D.

### 3. Authorities

- 3.1 The following provisions of the *Indian Act* are used for the leasing of designated land:

- 37.(2) *Except where this Act otherwise provides, lands in a reserve shall not be leased nor an interest in them granted until they have been surrendered to Her Majesty pursuant to subsection 38(2) by the band for whose use and benefit in common the reserve was set apart. ...*
- 38.(2) *A band may, conditionally or unconditionally, designate by way of a surrender to Her Majesty that is not absolute, any right or interest of the band and its members in all or part of a reserve, for the purpose of its being leased or a right or interest therein being granted. ...*
- 53.(1) *The Minister or a person appointed by the Minister for the purpose may, in accordance with this Act and the terms of the absolute surrender or designation, as the case may be,*
- (a) *manage or sell absolutely surrendered lands; or*
- (b) *manage, lease or carry out any other transaction affecting designated lands.*

## 4. Policy

- 4.1 **When to Choose a Designation:** Use a designation to lease **unallotted reserve land to non-members of the First Nation, for commercial and residential development**. In this context, "non-member" would include a corporation owned and beneficially controlled by a First Nation, which is not legally considered to have First Nation status, even if all of its shareholders are First Nation members. However, a **First Nation member can lease** designated land.
- 4.2 **When a Designation Is Not Appropriate:** Usually, a designation will offer the best route to setting up an effective leasing scheme for unallotted land. In some situations the designation and leasing of land are not recommended. The process of designating land is time-consuming and often complex. If the leasing objective can be **as effectively** achieved through a less complicated procedure, use that procedure. For example, if uncultivated or unused land is to be used for short term agricultural purposes, a permit under ss. 28(2) or a lease under ss. 58(1)(c) offer simpler, and equally effective approaches. In such a situation, use ss. 28(2) or ss. 58(1)(c) instead of the more cumbersome ss. 53(1). Also, if the land to be leased is allotted, and if it is intended that it should remain so, leasing by way of designation should not be used, as the designation will extinguish the individual interest. In that situation, use a locatee lease (see Directive 7-3).
- 4.3 **Leasing Guidelines for Designated Land:** Specific policy guidelines apply to all leases of designated land, whether those leases are for agricultural, commercial or residential/recreational purposes. Those policies are set out below, and following these guidelines is very important. For information on the form, content and negotiation of commercial, residential/recreational and agricultural leases, refer to Directive 7-4: General Guidelines for Drafting Leases, and the annexes attached to that directive. The policy guidelines applicable to all leases of designated land are:
- 4.3.1 **Application for Use of Land:** An "Application for Use of Land within an Indian Reserve" must be completed in detail for every lease proposal. This form must include all the information necessary to successfully draft the lease, and all the special terms which the parties have agreed upon.
- 4.3.2 **The Status of Designated Land Must be Clear:** In the interest of good land management practice, the Lands Officer must complete a Land Status Report to clearly determine the status of the land being designated **well before** any leasing agreement is finalized, and certainly before it is executed. While the land may be in the process of being designated for this lease, it should not be in the process of being designated for another purpose, or be in the process of being surrendered or allotted.

- 4.3.3 **The Lease Must Comply with the terms of the Designation:** Most modern day designations provide specific terms relating to how the land must be used, and may set out conditions which will apply to the lease. Any lease of designated land **must strictly follow the terms of the designation**. It is recommended that existing out-dated surrenders **for general leasing purposes** (ie. no specific purpose) be revoked and then re-designated to ensure informed community consent of a proposed lease. The qualification is that no interests must have been granted pursuant to the surrender for lease, and the First Nation council must be willing to replace the surrender.
- 4.3.4 **Length of the Lease:** A lease of designated lands **cannot extend beyond the date of termination of the designation**. If the term of the lease extends to the last day of the term of the designation, the lease must state that it will lapse on the last day of the term of the lease, without any further notice by the lessor.
- 4.3.5 **Rent:** As a rule, the leasing of designated land is intended to produce an appropriate economic return to the First Nation. Every designation requires that a fair market rent be obtained from the lessee whether or not stated, and if the First Nation has requested less than fair market rent, the designation must explicitly reflect that request. **Fair market rent must therefore be charged in every lease unless the terms of the designation specifically provide otherwise**. The designation must also clearly specify if the lessee will be permitted to pay less than fair market rent. There must be a provision for a review of the rent at least every five years.
- 4.3.6 **Rent Charged to First Nation Corporations:** Sometimes, a **First Nation corporation** that is leasing designated land **may receive special terms** as part of an overall economic strategy that benefits the First Nation. An example of such a benefit is reduced or nominal rent.
- 4.3.7 **Reduced Rent:** Where reduced rent is to be charged, the designation should specify the First Nation corporation **and** provide for the reduced rent. The designation documentation should include the following:
1. approval of the reduced rent by the band membership and acknowledgment as to what the fair market rent should be.
  2. acknowledgement that the profits and/or benefits from the enterprise will accrue to First Nation members, either through the First Nation corporation's Articles of Incorporation, or through the lease terms.
  3. a provision in the lease for fair market rent to kick in should the First Nation corporation lose their controlling interest.

- 4.4 The **Department of Justice must be consulted when a reduced rent lease is proposed to a First Nation corporation**. As well, the First Nation corporation and the First Nation council, as lessee, should each seek independent legal advice with respect to the lease.

**Lease Recitals:** The recitals (the introductory portion appearing before the main body) of every lease of designated land must contain certain information about the designation which authorizes it. At a minimum, the recitals should state:

- a) The date and Privy Council number of the designation Order-in-Council.
  - b) The Indian Land Registry Number of the designation Order-in-Council, if available.
  - c) The expiry date of the designation.
- 4.5 **Environmental Assessment:** Whenever parties enter into a lease, an environmental assessment must be conducted according to the requirements of the *Canadian Environmental Assessment Act*. Refer to Chapter 12 of this manual for the policy and procedures for environmental assessments.
- 4.6 **Authorizing the Lease of Designated Land:** Reserve band land must be designated **before** it can be leased pursuant to ss. 53(1)(b). Once a designation has been made, the lease of that designated land may be authorized **by the appropriate departmental officials** or **by the First Nation members who have been appointed** under ss. 53(1). Consult the current *Delegation of Authority Instrument under the Indian Act and Related Regulations* (refer to the appropriate regional delegation instrument) to determine which departmental officers are authorized to approve and sign leases of designated land.
- 4.7 **Delegation to the First Nation:** Under ss. 53(1), the Minister may delegate to anyone, including First Nations, the power to manage or lease designated lands. Technically, the word "person" in ss. 53(1) prevents the delegation of this authority to a First Nation as such, because it is not a person. The appointment must therefore refer by name to specific individuals or to positions such as the "Chief and Councillors from time to time." Where the Minister has made this delegation, the First Nation approves leases affecting designated land, subject to certain conditions and the terms of the delegation instrument. For more information on delegation under ss. 53(1), and the general requirements that must be met, refer to Chapter 11 - Land Management Devolution.



- 4.8 **Conditions of Approval:** The approval of leases of designated land under delegated ss. 53(1) authority is subject to the following minimum conditions:
- a) **Band Council:** Before a lease may be executed, the Band Council must consent to the lease by way of BCR or some other form of written council consent.
  - b) **Approval of the Form of Lease:** The department must approve the form of the lease, and any unusual terms. Leases more than five years in duration, including those providing for nominal rent, must contain a rent review clause. Regions have several standard lease agreements, such as a commercial lease and a cottage lease, which will help in this regard.
  - c) **Section 53 Delegations:** Approval of leases by the First Nation is subject to the terms, conditions and restrictions contained in the ministerial letter delegating authority to the Band Council under s. 53(1).

## 5. Process

- 5.1 This section summarizes the process for leasing band reserve land under ss. 53(1) of the *Indian Act*. This directive includes a comprehensive checklist which is attached as Annex A.
- 5.2 First Nations exercising delegated authority under ss. 53(1) are responsible for following the same steps taken by the Lands Officer, as identified in the checklist.
- 5.3 **Application for Use of Land:** At the earliest opportunity, an "Application for Use of Land Within an Indian Reserve" must be fully completed and placed on file. The steps to take to complete the application are set out below. A copy of the application is attached to this directive as Annex B.
- 5.4 **Obtain Information from the Proposed Lessee:** The proposed lessee must complete Part 1 of the "Application for Use of Land Within an Indian Reserve." This will provide basic information on the lessee, identify the land to be leased, set out its proposed use, and authorize a credit investigation if required.
- 5.5 **Determine Best Mechanism for the Purpose:** If the intended use is short term agricultural or grazing, and the land has not been already designated, issue a permit under ss. 28(2) or a lease under ss. 58(1)(c). If the intended use is commercial, residential, or long-term agricultural - ie: for a term more than 10 years - issue a lease of designated land under ss. 53(1). Refer to Directive 2-2: Transactions and Choosing Authorities, for further guidelines on choosing the best authorities.

- 5.6 **Prepare an Environmental Screening Report:** The appropriate departmental/First Nation officer must prepare an environmental screening report setting out the results of the environmental assessment. Refer to Chapter 12 of this manual for information on the policy and procedures for conducting the environmental assessment and preparing the screening report.
- 5.7 **Verify the Status of Land:** Confirm that the land to be leased is in fact band reserve land (unallotted), and not otherwise encumbered. Complete a Land Status Report (see Annex B), which requires a thorough search in the Indian Lands Registry to determine: the status of the land; whether the land has been designated under ss. 38(2); and whether any encumbrances affect the land.
- 5.8 **Confirm the Legal Description and Arrange for a Survey, if required:** The Lands Officer should confirm that an adequate legal description of the land exists that identifies it beyond any reasonable doubt. Refer to Schedule A of the *Framework Agreement between the Department of Indian Affairs and Northern Development and Legal Surveys Division, Earth Sciences Sector Natural Resources Canada* as amended from time to time. If the lease is for a term greater than 10 years, a survey may be required, providing that a survey does not already exist. The preparation of any survey required in this regard and all associated costs are the responsibility of the lessee (proponent).
- 5.9 **Conduct a Credit Investigation if required:** A thorough credit investigation of the proposed lessee should be conducted following regional guidelines, at the lessee's expense. It should be confirmed that the lessee has sufficient means to pay the agreed upon rent, and any related guarantees. Credit checks can be obtained through the local Credit Bureau. The lessee's name, address, and other available information are provided to the credit agency, which will search its records for information on the lessee's financial status and credit history. Refer to regional guidelines for further assistance in determining how to carry out the credit check.
- 5.10 **Check corporate status:** Where the lessee is a corporation, verify its corporate standing and the names of its current signing officers by searching the relevant corporate registry. The lessee must pay any costs associated with this investigation.

- 5.11 **Negotiate the Lease Terms:** The basic terms and conditions of the lease, except those which are mandated by legislation or departmental policy, or dictated by the terms of the designation, should be conditionally negotiated by or for the Band Council, with the assistance of the Lands Officer. The lessee should be provided with a copy of the standard lease or the departmentally approved equivalent applicable to the proposed use which incorporates clauses that would protect the Crown and First Nation during the term of the lease.
- 5.12 **Site Inspection of the Land:** The appropriate departmental office, or the appropriate First Nation lands staff, should inspect the land, and report the results in Part 2 of the "Application for Use of Land Within an Indian Reserve." The inspection should address matters such as:
- a) Access to the land by road or other means, and the services (such as water, sewer and power) available.
  - b) General land description and topography, confirming that the proposed site will accommodate the proposed use.
- 5.13 **Designation:** If the land is to be leased under ss. 53(1)(b), and it has not yet been designated, then designation of the land must take place before any lease agreement is executed. For large, complex leases, or where the lease includes special terms, those terms must be negotiated in advance and provided for in the designation. If available, attach a draft of the lease to the designation for large developments. Refer to Chapter 5 - Designations and Surrenders, for further guidance.
- 5.14 **Assess the Lease:** The Lands Officer should conduct an assessment of the proposed lease. Following the assessment of the lease, the Lands Officer should forward any concerns relating to the proposed lease to the Band Council. The assessment should consider, among other matters:
- a) the adequacy of the **rent** (based on an independent appraisal, provided by the proposed lessee, and reviewed if necessary by Public Works and Government Services Canada).
  - b) the **term** (refer to Directive 7-4: General Guidelines for Drafting Leases).
  - c) the proposed **use of the land** (taking into consideration the "Part 2: Land Inspection" of the "Application for Use of Land Within an Indian Reserve").
  - d) whether all terms and conditions required by **departmental policy** have been included.

**Assess the Lease (continued)**

- e) the suitability of all **non-standard clauses** appearing in the lease. If necessary, the opinion of the Department of Justice respecting specific non-standard clauses must be obtained and in consultation with the Lands Officer, the departmental position will be determined.
- f) the potential **environmental impact** of the lease (Pursuant to CEAA, have the departmental Environmental Specialist officer review an environmental assessment provided by the proposed lessee and prepare the environmental screening report).
- g) The review of the **Development Plan**, for leases which require significant improvements and/or construction (based on a review by Public Works and Government Services Canada).

5.15 **Address Identified Problems:** The Lands Officer should promptly address any problems or shortcomings in the lease identified by the assessment, or by the Band Council, and should request, if appropriate, that changes be made to the lease. If necessary, the Lands Officer should seek the guidance of departmental representatives in the regional office or at headquarters.

5.16 **Execution of the Lease:** It is suggested that 4 original leases are executed - one for the Indian Land Registry, the lessee, the First Nation, and the departmental file. The Lease should be executed in the following order:

- a) First, the First Nation **consents** (BCR).
- b) Second, the **Lessee** executes.
- c) Finally, the **Minister's delegated authority** executes.

**Note:**

If the First Nation is exercising delegated powers pursuant to ss. 53(1), consult the current *Delegation of Authority Instrument* under the *Indian Act* and *Related Regulations* (refer to the relevant regional delegation instrument).

5.17 **Registration of the Lease:** The Lands Officer sends the fully executed lease, with supporting documentation, to the Indian Lands Registry in Ottawa for registration. Refer to the *Indian Lands Registration Manual* to ensure that the lease document meets all the requirements for registration.

## 6. References

6.1 For more information, refer to:

- a) Chapter 12 of this manual for more information on Environmental considerations.
- b) Indian Lands Registration Manual
- c) Schedule A of the *Framework Agreement between Lands and Trust Services Department of Indian Affairs and Northern Development and Legal Surveys Division, Earth Sciences Sector Natural Resources Canada*, as amended from time to time.

## **Chapter 7**

### **Directive 7-2: Leasing Reserve Lands Using Designation**

#### **Annex A: Checklist for Leases on Designated Land**

## Checklist for Leases on Designated Land

The Lands Officer, or, for ss. 53(1) First Nations, the delegated authority, should take the following steps:

1	Obtain a fully completed "Application for Use of Land Within an Indian Reserve" from the proposed lessee.	
2	Ensure the proposed lessee has fully completed Part I of "Application for Use of Land Within an Indian Reserve" and has authorized credit investigation;	
3	Confirm that designation and lease under ss. 53(1) is the appropriate mechanism.	
4	Pursuant to CEAA, have the departmental Environmental Specialist officer review environmental assessment provided by the proposed lessee and prepare the environmental screening report.	
5	Verify land status and complete a Land Status Report, to determine: <ul style="list-style-type: none"> <li>i) the status of the land.</li> <li>ii) whether the land has been designated pursuant to ss. 38(2).</li> <li>iii) whether there are any encumbrances affecting the land.</li> </ul>	

6	<p>Confirm that an adequate legal description exists:</p> <ul style="list-style-type: none"> <li>i) if lease is for a term of 10 years or less, it can be described as a textual reference, however a Registration Plan is recommended. Refer to Schedule A of the <i>Framework Agreement between Lands and Trust Services Department of Indian Affairs and Northern Development and Legal Surveys Division, Earth Sciences Sector Natural Resources Canada</i> as amended from time to time</li> <li>ii) if lease is for a term of between 10 to 25 years, is there a Registration Plan?</li> <li>iii) if lease is for a term of between 25 to 49 years, is there a Registration Plan or a CLSR Plan?</li> <li>iv) if lease is for a term in excess of 49 years, is there a CLSR Plan?</li> </ul>	
7	Conduct credit investigation.	
8	Conduct corporate status check.	
9	<p>Negotiate the basic terms of the lease and incorporate these clauses into the standard lease or departmentally approved equivalent:</p> <ul style="list-style-type: none"> <li>i) provide lessee with draft copy of the lease; and,</li> <li>ii) with the assistance of Public Works and Government Services Canada, if required, determine whether personal guarantees or performance bonds are required.</li> </ul>	



10	Arrange for conduct of site inspection of land. Confirm:  i) access to the land by road or other mean.  ii) the services (water, sewer and power) available.  iii) general land description and topography, confirming that the proposed site matches the land description.  iv) See Item 14 - Assessment of lease.	
11	Complete Land Inspection portion (i.e. Part 2) of the "Application for Use of Land Within an Indian Reserve".	
12	Ensure proper designation is in place, or complete the designation (see Chapter 5 for details).	
13	Confirm lease terms are consistent with the terms of designation.	

14	<p>Conduct an assessment of the lease, including:</p> <ul style="list-style-type: none"><li>a) the adequacy of the <b>rent</b> (based on an independent appraisal, provided by the proposed lessee, and reviewed if necessary by Public Works and Government Services Canada);</li><li>b) the <b>term</b> (refer to Directive 7-4: General Guidelines for Drafting Leases);</li><li>c) the proposed <b>use of the land</b> (taking into consideration "Part 2: Land Inspection" of the "Application for Use of Land Within an Indian Reserve");</li><li>d) whether all terms and conditions required by the designation and/or the <b>departmental policy</b> have been included (based on standard lease document);</li><li>e) the suitability of all <b>non-standard clauses</b> appearing in the lease. If necessary, the opinion of the Department of Justice respecting specific non-standard clauses must be obtained and in consultation with the Lands Officer, the departmental position will be determined;</li><li>f) the potential <b>environmental impact</b> of the lease (Pursuant to CEAA, have the departmental Environmental Specialist officer review an environmental assessment provided by the proposed lessee and prepare the environmental screening report)</li><li>g) Review the <b>Development Plan</b>, on leases which require significant improvements and/or construction (based on a review by Public Works and Government Services Canada).</li></ul>	
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15	<p>Review the lease before execution to ensure that all standard terms and requirements are present, including the following terms and conditions:</p> <ul style="list-style-type: none"><li>i) The full formal name and address of the lessee and if the lease is a company, the following statement:<ul style="list-style-type: none"><li>- the name of the company, stated as in the Certificate of Incorporation/Letters Patent</li><li>- the jurisdiction of incorporation</li><li>- the address of the head office</li><li>- authorization to enter into land transactions</li></ul></li><li>ii) Specify the applicable authority under the <i>Indian Act</i>;</li><li>iii) A full and identifiable land description, including identification of any existing easements or other encumbrances;</li><li>iv) The amount and period of rental payments, including:<ul style="list-style-type: none"><li>a) the date on which payment is due;</li><li>b) if rent is to be a percentage of another quantity, the agreed method of calculation;</li><li>c) whether the rent is it to be reviewed at least every five years;</li><li>d) a mechanism for determining the rent in the event the parties fail to agree; and</li><li>e) a mechanism for adjusting a nominal rent to fair market rent upon the assignment of a band corporation lease to non-band lessee.</li></ul></li></ul>	
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15	<ul style="list-style-type: none"> <li>v) Clearly defined acceptable uses of the demised lands;</li> <li>vi) The standards to be followed specifically in respect of: <ul style="list-style-type: none"> <li>a) construction and safety;</li> <li>b) health; and</li> <li>c) property maintenance.</li> </ul> </li> <li>vii) Any performance requirements;</li> <li>viii) Any fencing requirements;</li> <li>ix) Environmental provisions, such as waste or rubbish contamination, compliance with environmental standards, environmental assessments and mitigation, environmental protection, no contaminants or hazardous substances, mitigation of environmental impacts, etc.;</li> <li>x) Whether issues of dangerous objects, noxious weeds, etc. have been addressed;</li> <li>xi) Any provisions for cancellation of the lease for specified reasons;</li> <li>xii) Provision for ownership of improvements at the end of the lease, and who is to decide or quantify;</li> <li>xiii) Provision of insurance at lessee's expense for: <ul style="list-style-type: none"> <li>a) fire;</li> <li>b) public liability; and</li> <li>c) crops.</li> </ul> </li> <li>xiv) Indemnification of Her Majesty from all claims, damages, costs, etc.</li> </ul>	
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15	<ul style="list-style-type: none"> <li data-bbox="313 296 1276 363">xv) Whether lessee undertakes to pay all taxes, levies, or other charges;</li> <li data-bbox="313 405 1235 472">xvi) Whether lessee covenanted to comply with all applicable laws, including First Nation bylaws;</li> <li data-bbox="313 514 1260 581">xvii) Whether the Crown reserved the mineral rights in, upon or under the demised lands;</li> <li data-bbox="313 623 1300 728">xviii) Whether the lessee is given the right to hold, use and occupy the premises without interference so long as rents are paid and covenants complied with;</li> <li data-bbox="313 770 1300 875">xix) Whether the lease has been duly executed by the lessee and Affidavits of Execution or corporate seals have been provided;</li> <li data-bbox="313 917 1276 1169">xx) If the lease is in the nature of a headlease, <ul style="list-style-type: none"> <li data-bbox="431 989 1276 1056">a) whether it is mandatory to register all sub-leases in the Indian Lands Registry.</li> <li data-bbox="431 1098 1211 1165">b) whether the sub-lessee is responsible for a CEAA assessment.</li> </ul> </li> <li data-bbox="313 1211 1276 1610">xxi) If the lease is assignable, <ul style="list-style-type: none"> <li data-bbox="431 1283 1276 1350">a) provision for the payment of a fee upon assignment of the lease;</li> <li data-bbox="431 1392 1276 1497">b) whether the provision stipulates that the fee must be a true reflection of expenses incurred in connection with the assignment; and</li> <li data-bbox="431 1539 1276 1606">c) provision that the lessee may not assign or transfer the lease without Her Majesty's consent.</li> </ul> </li> <li data-bbox="313 1652 1300 1719">xxii) Provision that upon bankruptcy or receivership of lessee, Her Majesty may terminate;</li> </ul>	
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15	<p>xxiii) Provision that Her Majesty's or other applicable authorities' representative may enter to view and inspect premises;</p> <p>xxiv) Where, in Her Majesty's opinion, a nuisance exists, the lessee may be ordered to abate and pay costs thereof;</p> <p>xxv) Upon expiry of the lease, the lessee shall peaceably surrender possession to Her Majesty;</p> <p>xxvi) Where the lease contemplates major commercial, industrial or residential development, the following terms should appear:</p> <ul style="list-style-type: none"> <li>a) Improvements will revert to the lessor, or if not, evidence on file that this condition has been expressly waived.</li> <li>b) An acceptable development plan has been submitted to the Minister prior to granting of lease.</li> <li>c) Security, in the form of a performance bond, should be obtained to guarantee completion of the development.</li> </ul> <p>xxvii) Arrange for 4 original lease documents to be executed. One each for the Indian Land Registry, the lessee, the First Nation, and the departmental file.</p> <p>The Lease should be executed in the following order:</p> <ul style="list-style-type: none"> <li>a) First, the First Nation <b>consents</b> (BCR);</li> <li>b) Second, the <b>Lessee</b> executes;</li> <li>c) Finally, the <b>Minister's delegated authority</b> executes.</li> </ul> <p><b>Note:</b> If the First Nation is exercising delegated powers pursuant to ss. 53(1), consult the current <i>Delegation of Authority Instrument under the Indian Act and Related Regulations</i> (refer to the relevant regional delegation instrument); and</p> <p>xxix) Register the lease in the Indian Lands Registry.</p>	
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**Chapter 7**

**Directive 7-2:  
Leasing Reserve Land  
using Designation**

**Annex B:  
Application for Use of Land  
within an Indian Reserve**

**Annex B**  
**Example of an Application for Use of**  
**Land within an Indian Reserve**

**PART 1** (To be completed by the Applicant)

- 1. Name in full: \_\_\_\_\_
- 2. Company name: \_\_\_\_\_
- 3. Address: \_\_\_\_\_  
\_\_\_\_\_
- 4. Company Number \_\_\_\_\_
- 5. Telephone Number: (Res.) \_\_\_\_\_  
(Bus.) \_\_\_\_\_
- 6. Directors & officers  
of the company: \_\_\_\_\_
- 7. Applicant's occupation: \_\_\_\_\_
- 8. Employer's name: \_\_\_\_\_  
Address: \_\_\_\_\_  
\_\_\_\_\_
- 9. Number of years with employer: \_\_\_\_\_

**Property applied for** (to be completed by applicant)

- 1. Band: \_\_\_\_\_  
Reserve: \_\_\_\_\_
- 2. Purpose(s) \_\_\_\_\_  
(Residential, cottage, commercial, industrial, agricultural, R/W, etc.)
- 3. Description of Land: \_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

(Attach appropriate plan or survey. Provide sufficient detail to identify location.)



**Basic Proposed Terms of Lease** (to be completed by applicant)

- 1. Proposed Commencement Date: \_\_\_\_\_
- 2.. Proposed Duration: \_\_\_\_\_
- 3. Independent Appraisal completed by: \_\_\_\_\_  
Pending
- 4. Proposed Rent Offered: \_\_\_\_\_

**WE HEREBY CONSENT TO HAVING THE DEPARTMENT OF INDIAN AFFAIRS CONDUCT OR CAUSE TO BE CONDUCTED A PERSONAL CREDIT INVESTIGATION.**

Dated at \_\_\_\_\_ this \_\_\_\_\_  
day of \_\_\_\_\_ 20\_\_\_\_\_.

WITNESS \_\_\_\_\_ APPLICANT \_\_\_\_\_

WITNESS \_\_\_\_\_ CO-APPLICANT \_\_\_\_\_

**PART 2 LAND INSPECTION**

(To be completed by the appropriate departmental officer)

1. Description of site: \_\_\_\_\_

\_\_\_\_\_  
(General location, proximity to water frontage, river, etc.)

2. Topography: \_\_\_\_\_

\_\_\_\_\_  
(Soil, ground cover, etc.)

3. Access to public road: \_\_\_\_\_

4. Distance to nearest community: \_\_\_\_\_

5. Available services:

- Water \_\_\_\_\_
- Sewer \_\_\_\_\_
- Power \_\_\_\_\_
- Natural gas \_\_\_\_\_
- Telephone \_\_\_\_\_
- Garbage collection \_\_\_\_\_
- Other (specify) \_\_\_\_\_

6. Present use: \_\_\_\_\_

7. Comments: \_\_\_\_\_

\_\_\_\_\_  
\_\_\_\_\_

\_\_\_\_\_  
Name, Title

\_\_\_\_\_  
Signature

\_\_\_\_\_  
Date

### PART 3 LAND STATUS REPORT

Reserve Name: \_\_\_\_\_ No.: \_\_\_\_ **First Nation:** \_\_\_\_\_

Proposed Purpose (check box):

<input type="checkbox"/> Band land Lease	<input type="checkbox"/> Permit
<input type="checkbox"/> Locatee land Lease	<input type="checkbox"/> Designation
<input type="checkbox"/> Easement	<input type="checkbox"/> Section 35 Transfer
<input type="checkbox"/> Other: (specify) _____	

**Legal Description** (attach copy of plan and/or NRCAN letter of description to Land Status Report):

Lands: Lot \_\_\_\_\_ Block \_\_\_\_\_ Plan No. \_\_\_\_\_ (RS/CLSR)

Textual Description: \_\_\_\_\_  
 \_\_\_\_\_  
 \_\_\_\_\_  
 \_\_\_\_\_

**Status of Land** (check box (es) if applicable):

- Band Land (not designated or Surrendered); or,
- Designated Land; or
- Locatee Land.

If **Designated Land**, Complete the following (attach copy of designation to Land Status Report):

Number Order-in-Council: P.C \_\_\_\_\_ - \_\_\_\_\_

Date of Order-in-Council: \_\_\_\_\_

ILR Registration No: \_\_\_\_\_

Term or Period of Designation: From \_\_\_\_\_ (m/d/y) To \_\_\_\_\_ (m/d/y)

Purpose(s) of Designation: \_\_\_\_\_  
 \_\_\_\_\_

Conditions of Designation: \_\_\_\_\_  
 \_\_\_\_\_  
 \_\_\_\_\_

If **Locatee Land**, Complete the following: (attach copy of documentation, including Parcel Abstract to Land Status Report):

Locatee: \_\_\_\_\_  
 Last name First name Band No.

Address: \_\_\_\_\_  
 Street City Postal Code

Locatee's phone no.: \_\_\_\_\_ (h) \_\_\_\_\_ (w) \_\_\_\_\_ (cell)

Lawfully Held by:(check box)

- CP - ILR Registration No: \_\_\_\_\_ ; or,
- NE - ILR Registration No: \_\_\_\_\_ ; or,
- NETI - ILR Registration No: \_\_\_\_\_ ; or,
- Cardex - ILR Registration No: \_\_\_\_\_ ; or,

**Encumbrances** (attach documentation, including Reserve General Abstract, to Land Status Report):

List of registered instruments which may affect this parcel: (check box)

- Lease - ILR Registration No: \_\_\_\_\_ ; or,
- Permit - ILR Registration No: \_\_\_\_\_ ; or,
- Surrender - ILR Registration No: \_\_\_\_\_ ; or,
- Easement - ILR Registration No: \_\_\_\_\_ ; or,
- Section 35 - ILR Registration No: \_\_\_\_\_ ; or,
- Cardex: - ILR Registration No: \_\_\_\_\_ ; or,
- \_\_\_\_\_ - ILR Registration No: \_\_\_\_\_ ; or,
- \_\_\_\_\_ - ILR Registration No: \_\_\_\_\_ ; or,

**Comments and/or matters to be dealt with:**

\_\_\_\_\_  
 \_\_\_\_\_

I have reviewed the proposed land transaction and have searched the Indian Lands Registry records relating to the parcels affected by this transaction. According to these records, the proposed transaction: (check box)

- will **not** cause a conflict with existing registered interests;
- will cause a conflict with existing registered interest as identified herein, and must be dealt with as per comments above.

\_\_\_\_\_  
 Name, Title Signature Date

**Band Council RESOLUTION AND CONSENT**

**(Sample wording)**

\_\_\_\_\_

The Council of the \_\_\_\_\_ Band do hereby resolve and consent to the granting of a \_\_\_\_\_ (lease, permit) \_\_\_\_\_ by the Minister of Indian Affairs and Northern Development of the lands as described in Schedule "A" attached, for a term of \_\_\_\_\_ years, for the benefit of \_\_\_\_\_ (band, locatee) \_\_\_\_\_ under terms and conditions as described in Schedule "A" attached.

\_\_\_\_\_  
(Chief)

\_\_\_\_\_  
(Councillor)

\_\_\_\_\_  
(Councillor)

\_\_\_\_\_  
(Councillor)

\_\_\_\_\_  
(Councillor)

\_\_\_\_\_  
(Councillor)

\_\_\_\_\_  
(Councillor)

A quorum for this band consists of \_\_\_\_\_

Dated at \_\_\_\_\_ this \_\_\_\_\_  
day of \_\_\_\_\_ 20\_\_\_\_.

## Directive 7-3 Locatee Leases

### 1. Purpose

1.1 This directive explains how to lease allotted (“locatee lands”) reserve lands under ss. 58(3) of the *Indian Act*, at the request of the locatee. This directive gives information and guidance with respect to:

- a) **Policy:** The principles and requirements which underlie the use of ss. 58(3);
- b) **Process:** The steps and procedures involved in using ss. 58(3) to lease Locatee land.

### 2. General

2.1 **Before Reading This Directive:** Review Directive 7-1: Leasing Reserve Land - An Overview, which will serve as a roadmap for navigating within Chapter 7. Directive 7-1 discusses the legal framework underlying leases, and offers an overview of the leasing mechanisms under the *Indian Act*. It also contains helpful definitions of terminology that will be found throughout this chapter.

2.2 **Leasing Locatee Land Generally:** Locatee lands are reserve lands which the Band Council has validly allotted under the *Indian Act*, possession of which is generally evidenced by a Certificate of Possession (CP). The authority for the leasing of locatee land is found in the following sections of the *Indian Act*:

- a) Under **ss. 58(1)(b)** of the Act, **uncultivated or unused land** in the possession of an individual may be leased, with the consent of the Band Council, **for agricultural or grazing purposes** or for any purpose that is **for the benefit of the person in possession**. This mechanism is rarely used today, and Lands Officers should consider, where appropriate, the use of ss. 58(3) leases or ss. 28(2) permits. Refer to Directive 7-1, paragraphs 16 and 18, for further information on leasing allotted land under ss. 58(1)(b).

- b) Under **ss. 58(3)** a locatee can apply to the Minister to lease all or part of the land in the locatee's possession **without the land being designated**. This type of lease is commonly called a "locatee lease", and it is the most common method used to lease allotted land.
- 2.3 **How the *Indian Act* Works:** Through the lease, the Crown grants to a lessee the locatee's right to exclusive use of the land for a specified period. The *Indian Act* does not require a designation. The *Indian Act* does not suggest how the proceeds of the lease are to be divided, if at all. However, departmental policies on these issues should be followed, as explained in the policy section of this directive.
- 2.4 **Using ss. 58(3):** Locatee leases are the most common way to lease allotted land, for several reasons. Because the time-consuming process of designation is not required, ss. 58(3) offers a convenient vehicle to develop reserve lands occupied by locatees. Provided that there are no band bylaws prohibiting certain locatee lease arrangements, there is also no limit on the kind of use that the land may be leased for, and no requirement that the lands be uncultivated or unused. As well, unlike a designation, the lease does not extinguish a locatee's interest in the land.
- 2.5 **Who Can Lease Locatee Land:** Although ss. 58(3) leases are usually used to lease locatee land to non-First Nation members, a locatee may also use ss. 58(3) to lease locatee land to another First Nation member.
- 2.6 **Negotiating ss. 58(3) Leases**
- 2.6.1 **Role of the Lands Officer:** It is the obligation of Lands Officers to ensure that the department's policy requirements for preparing, executing and registering leases are met. The locatee may call upon the Lands Officer to assist in the negotiations with the lessee of the non-mandatory terms of leases. In the interests of fair negotiation, the proposed lessee and any other interested parties should be advised at an early date that our applicable standard lease terms and document will form the basis for the lease. Therefore, the basic terms and conditions of the lease should be conditionally negotiated by, or for the locatee, and inserted into the standard lease by the Lands Officer, and the entire document should be provided to the lessee. Any proposed changes by a potential lessee or First Nation should be highlighted with redline/strike-out for clarity of negotiations.

2.6.2 **What is Negotiable:** Following basic guidelines, the parties must negotiate key elements in every lease. These elements include the name of the lessee, the rent, the term of the lease, the proposed use of the land. Among the terms which should be negotiated at an early stage are:

- a) The **proposed use of the land** (such as commercial, residential, recreational or agricultural) and the specific development or activity planned, should be clearly agreed upon. For example, the commercial uses of the land might encompass a retail store, a gas station or a hot dog wagon, and the particular use should be unambiguously explained;
- b) the proposed **term of the lease**;
- c) the **legal description of the land** to be leased Note: a Registration Plan or CLSR Survey is required for most leases. (see Schedule A of the *Framework Agreement between Lands and Trust Services Department of Indian Affairs and Northern Development and Legal Surveys Division, Earth Sciences Sector Natural Resources Canada* as amended from time to time);
- d) the **proposed rent** (based on an independent appraisal provided by the proposed lessee and approved by Public Works & Government Services Canada).

**Notes:**

1. Where a ss. 53(1) delegation has been made, the First Nation's Land Manager, employed by the First Nation, or the delegated authority handles lease negotiations.
2. The originator of a lease document is always the Lands Officer, or a First Nation with ss. 53(1) delegation. The Lands Officer should never accept a draft lease from a proponent as a precedent.

2.6.3 **Mandatory Terms:** Besides the negotiable items such as rent and term, legislation and departmental policy impose many terms and conditions to be contained in leases of reserve land. These mandatory terms cover most of our standard terms; such as insurance, tenant improvements, and construction standards, which are not usually negotiable. Some terms, however, are unique to each lease, and must be discussed internally before the best course of action can be chosen.



- 2.7 **Guidelines for Commercial, Recreational and Agricultural Leases:** For information on the form, content and negotiation of commercial, recreational and agricultural leases, refer to Directive 7-4: General Guidelines for Drafting Leases, and to the specific guidelines attached to Directive 7-4 as Annexes A through D.

### 3. Authorities

- 3.1 The following provisions of the *Indian Act* are used to lease allotted land:

58.(1) *Where land in a reserve is uncultivated or unused, the Minister may, with the consent of the council of the band, . . .*

(b) *where the land is in the lawful possession of any individual, grant a lease of such land for agricultural or grazing purposes or for any purpose that is for the benefit of the person in possession; . . .*

58.(3) *The Minister may lease for the benefit of any Indian, on application of that Indian for that purpose, the land of which the Indian is lawfully in possession without the land being designated.*

### 4. Policy

- 4.1 The terms of a locatee lease must comply with all existing bylaws of the First Nation.
- 4.2 **First Nation Interest in Leases of Locatee Land:** The role of the First Nation in leasing locatee land is a function of the requirements of the *Indian Act*, case law, and departmental policy. Even when the *Indian Act* does not provide for First Nation involvement, policy requires that First Nations be given input into the decision-making process.
- 4.3 **The *Indian Act* does not specifically provide for any First Nation input** into locatee leases. However, the department recognizes that **First Nations have an important interest in the use and development of reserve land**, including those lands that the First Nations have allotted to their members. The department must seek input from the Band Council, but an objection by the Band Council does not amount to a veto of the lease. However, it is departmental policy to give Band Councils an opportunity to express their views on all proposed locatee leases.

- 4.4 This legal duty to seek input from the Band Council can pose significant difficulty where a First Nation which has received delegated authority from the Minister under s. 60 objects to the lease. In such a situation the duty of the Band Council, as the Minister's representative, is not toward the First Nation which elected it, but toward the locatee. In such situations, the First Nation may need to consult with DIAND to clarify its legal obligations.

## 5. Approving Locatee Leases With Terms Less than 49 Years

- 5.1 **Council Feedback:** The Band Council must be requested to express their views as to conformity with First Nation land use policies, zoning or development plans on all locatee leases with terms of 49 years or less, including all renewal terms. In seeking Council feedback, the following points should be kept in mind:
- a) **Time Deadlines:** The Lands Officer should advise the Council that any comments with respect to the lease must be received within a reasonable time. As a rule, three to four weeks is a reasonable response time. The Council should be advised in writing of the deadline for responding, and informed that if the department receives no response within the time specified, then the First Nation will be presumed to have no comment to make;
  - b) **Bylaws:** The Band Council should be asked to confirm that the proposed lease does not contravene approved reserve land use plans or zoning bylaws;
  - c) **Objections:** Land officers must carefully consider any objections to a proposed lease that the Band Council may raise, and ensure that the objections are relevant and valid.
- 5.2 **Delegation to the First Nation:** Under s. 60, the Minister may delegate to First Nations the power to manage or lease non-designated lands in the reserve occupied by the First Nation. Where a s. 60 delegation has been made, that First Nation approves leases made under ss. 58(3), subject to the conditions attached to the delegation. For more information on delegation under s. 60, refer to Chapter 11 - Land Management Devolution.

## 6. Approving Locatee Leases with Terms More than 49 Years

- 6.1 For practical purposes, a locatee lease with a very long term could be considered a way of bypassing the surrender or designation provisions of the *Indian Act*. This would be especially true if the entire rent is payable in advance. In recognition of this, consent of the membership by way of a **band vote for leases more than 49 years** is required.
- 6.2 **Issues to be Considered:** When First Nation electors are approving a lease with a term in excess of 49 years, several key issues should be considered before the vote takes place:
- a) the **social and cultural influence** of the lease;
  - b) the **economic impact** of the lease on the First Nation;
  - c) the **environmental consequences** of the proposed transaction;
  - d) the **compatibility** of the lease **with First Nation bylaws**.
- 6.3 **Approval by Electors:** All leases with terms of more than 49 years must be approved by a **majority of the eligible electors** of a First Nation called to vote on the proposed lease. Both on/off-reserve electors must be consulted.
- 6.4 **Informed Decision-making:** It is important that all eligible electors make an **informed** decision.
- a) **Notice:** The notice should include the locatee's name, the location of the land, the lease term, the proposed use of the property, and the rent. The department must ensure that all information concerning the decision, which the department knows is available, is made available to the electors;
  - b) **Copies of the Lease:** Copies of the proposed lease should be made available for review by the First Nation electors prior to the meeting.

6.5 **Ministerial Approval of a long term Locatee lease:** Before the Minister will approve a locatee lease in excess of 49 years, the First Nation must assent to the lease by way of a band vote. Region should receive from the First Nation:

- a) a copy of the notice of the meeting;
- b) a BCR which sets out: (a) the number of eligible voters who voted, and (b) the number of votes which were cast in favour and against the lease, and the number which were spoiled;

6.6 **Modifying Long-term Leases:** Holding a new vote of First Nation electors to confirm amendments or modifications to an approved long-term locatee lease is not usually necessary. However, **a vote is required** where the amendment or modification involves:

- a) an extension of the lease term, including an extension of a lease with a term less than 49 years that extends the term to more than 49 years;
- b) an extension of the area covered by the lease;
- c) a substantial change in the proposed use of the leased land;

**Note:** Further to Clauses 6.1 and 6.5, proposals from a lessee and/or a locatee to extend the term of a lease once several years of the given lease have passed (ie. 20 years of a 49 year lease have passed and the lessee wishes to “top up” the lease to another 49 year term) should **not** be supported. This would be in direct contravention of departmental policy to not allow the long term alienation of reserve land without the consent of the First Nation membership.

6.7 **Delegation of the Approval Process:** The electors of a First Nation may delegate to the Band Council their right to approve leases in excess of 49 years, subject to the following conditions:

- a) The delegation must be by a majority vote of those First Nation electors both on/off-reserve;
- b) Written **notice of the above meeting must be publicly posted** at least 15 days before the meeting date;

**Delegation of the Approval Process (continued)**

- c) At the request of any elector, the vote must be taken by secret ballot;
- d) **A record of the vote must be tabulated**, and made available, upon request, to First Nation members. The record will include a tally of: the number of electors eligible to vote; the number voting in favour of the delegation; and the number voting against the delegation; the number of ballots spoiled, if any;
- e) A copy of the notice advising of the vote, together with the record of the vote, must be forwarded to DIAND headquarters;
- f) Delegations are valid only for the term of the Band Council in office at the time of the vote. After a new Council has been elected, a new vote must be held to confirm a new delegation, even if the same Council is returned to office; and
- g) A delegation made pursuant to this policy **may be revoked at any time by a new vote or by way of petition** signed by the lesser of:
  - i) the same number of electors who originally voted in favour of the delegation; or,
  - ii) 50% + one of the electors of the First Nation.

## 7. Dividing Locatee Rent Revenues

- 7.1 Although ss. 58(2) of the *Indian Act* provides a mechanism for allocating rent received from ss. 58(1)(b) leases, the *Indian Act* **does not set out a scheme for distributing rental revenues obtained from locatee leases**. However, reserve lands are ultimately held for the benefit of First Nations members as a whole. It is therefore departmental policy to provide **First Nations with an opportunity to express their views on how to divide locatee lease rentals**. This is particularly important for long-term leases. The department should also advise the locatee of the implications of proceeding by way of a ss. 58(1)(b) lease.

- 7.2 **Leases for Terms Less than 49 Years:** The locatee and the Band Council will negotiate how to divide rental revenue from short-term locatee leases, if at all. If no written First Nation policy exists on revenue sharing, and where the term is less than 49 years, note the following:
- a) Any agreement reached with respect to the sharing of lease revenues **must be in writing** and signed by the locatee and the Band Council;
  - b) The department will recognize the manner in which locatees and the Band Council divide the revenues from existing leases until the end of the lease terms, or until the leases are otherwise terminated.
- 7.3 Where an overall revenue sharing policy has been, or will be considered, any such revenue sharing **policy should be approved by a** majority of First Nation electors in a manner to be determined by the First Nation council. Once a policy has been approved, a BCR setting out the particulars should be forwarded to Ottawa and deposited in the Indian Lands Registry.
- 7.4 If a First Nation does not have an established policy on the division of locatee lease revenues from leases more than 49 years, then the electors voting to approve the lease should consider the issue.

## 8. Process

- 8.1 This section summarizes the process for leasing locatee land under ss. 58(3) of the *Indian Act*. A detailed checklist for the procedures for a locatee lease is included as Annex A to this directive. The following paragraphs outline the major steps that should be followed when allotted land is leased. **Note that some of these steps will take place simultaneously.**
- 8.2 **Inform the Locatee of Relevant Leasing Policies:** Before taking any other actions, the locatee should be fully advised about all applicable policies relating to the leasing of locatee lands.
- 8.3 **Application for Use of Land:** At the earliest opportunity, an "Application for Use of Land within an Indian Reserve" must be fully completed and placed on file. The steps to complete the Application are set out below. A copy of the application is attached to Directive 7-3 as Annex B.

- 8.4 **Obtain Information from the Lessee:** The proposed lessee must complete the appropriate sections of the "Application for Use of Land within an Indian Reserve." This will provide basic information on the lessee, identify the land to be leased and set out its proposed use, and authorize a credit investigation.
- 8.5 **Obtain Locatee Consent to Lease:** The locatee should sign the "Application for Use of Land within an Indian Reserve" to confirm that he or she consents to the lease. Where the First Nation has allotted the land to more than one locatee, the signatures of all locatees are required before the transition can proceed.
- 8.6 **Verify the Status of the Land:** Complete "Part 3: Lands Status Report" of the "Application for the Use of Land within an Indian Reserve", which will include a search in the Indian Lands Registry to confirm that the legal description of the land and that it is in the lawful possession of the locatee seeking to lease it, and to identify any encumbrances registered against it.
- 8.7 **Confirm the Legal Description and Arrange for a Survey, if Required:** The Lands Officer should confirm adequacy of the legal description of the land. Note: a Registration Plan or CLSR Survey is required for most leases (see Schedule A of the *Framework Agreement between Lands and Trust Services Department of Indian Affairs and Northern Development and Legal Surveys Division, Earth Sciences Sector Natural Resources Canada*). If the lease is for a term greater than 10 years, the Indian Lands Registry will require a survey of the land, if a survey does not already exist. The preparation of any survey and all associated costs are the responsibility of the lessee. The Lands Officer will simply advise the lessee of this requirement and ensure that the survey is completed prior to the signing of the lease.
- 8.8 **Prepare an Environmental Screening Report:** The Lands Officer must ensure that the environmental screening report setting out the results of the environmental assessment is reviewed by the regional environment officer. Refer to Chapter 12 of the manual for information on the policy and procedures for conducting the environmental assessment and preparing the screening report.

- 8.9 **Conduct a Credit Investigation:** A thorough credit investigation of the proposed lessee should be conducted at the lessee's expense when required. It should be confirmed that the lessee has sufficient means to pay the agreed upon rent, and any related guarantees. Credit checks can be obtained through the local Credit Bureau. The lessee's name, address, and other available information are provided to the credit agency, which will search its records for information on the lessee's financial status and credit history. Refer to regional guidelines for further assistance in determining how to carry out the credit check.
- 8.10 **Check corporate status:** Where the lessee is a corporation, verify its corporate standing and the names of its current signing officers by means of a search in the relevant corporate registry. The lessee should pay the cost of this investigation.
- 8.11 **Inspect the Land:** The determination of whether the land can be used for the purposes intended by the lease is the responsibility of the lessee. The Lands Officer arranges for an inspection of the land by the appropriate First Nations land staff and reports the results in Part 2 of the "Application for Use of Land Within an Indian Reserve." The inspection, which is intended to confirm the location and description of the land, should address matters such as:
- a) Access to the land by road or other means, and the services (such as water, sewer and power) available;
  - b) General land description and topography, confirming that the proposed site matches the land description;
- 8.12 **Negotiate the Lease Terms:** Refer to Clause 2.6 "Negotiating ss.58(3) Leases" in this directive. As well, the requirement for a personal guarantee or performance bonds if required should be addressed with the proposed lessee at this stage.
- 8.13 **Assess the Lease:** The Lands Officer should conduct an assessment of the proposed lease. Following the assessment of the lease, the Lands Officer should forward any concerns relating to the proposed lease to the locatee. The assessment should consider, among other matters:
- a) the adequacy of the **rent** (based on an independent appraisal, provided by the proposed lessee, and reviewed by Public Works and Government Services Canada if required);



- b) the **term** (refer to Directive 7-4: General Guidelines for Drafting Leases);
  - c) the proposed **use of the land** (taking into consideration the "Part 2: Land Inspection" of the "Application for Use of Land Within an Indian Reserve");
  - d) whether all terms and conditions required by **departmental policy** have been included (based on standard lease document);
  - e) the suitability of all **non-standard clauses** appearing in the lease. If necessary, the advice of the Department of Justice respecting specific non-standard clauses must be obtained;
  - f) the potential **environmental impact** of the lease (Pursuant to CEEA, have the departmental Environmental Specialist officer review an environmental assessment provided by the proposed lessee and prepare the environmental screening report)
  - g) The review of the **Development Plan**, on leases which require significant improvements and/or construction (based on a review by Public Works and Government Services Canada if necessary).
- 8.14 **Address Identified Problems:** The Lands Officer should promptly address any problems or shortcomings in the lease identified by the assessment, or by the Band Council, and should request, if appropriate, that changes be made to the lease. If necessary, the Lands Officer should seek the guidance of departmental representatives in the regional office or at headquarters.
- 8.15 **Allocate the Proceeds of the Lease:** Where the lease term is 49 years or less, and the First Nation has a policy on the division of revenue, revenues collected must be divided according to the First Nation's policy on revenue division. If the First Nation and the locatee agree to divide lease revenues, a written agreement should be signed by the locatee and the Band Council and placed on file.
- 8.16 The division of revenues from leases with terms greater than 49 years must follow the First Nation's policy on division of revenues. If such a policy does not exist, then the vote called to approve the lease should consider the issue.
- 8.17 **Request Band Council Feedback for Short Term Leases:** For leases with terms of 49 years or less, the Lands Officer should request in writing any comments of the Band Council with respect to the lease, and give the Council a deadline for responding. The Lands Officer should specifically ask whether the lease contravenes any existing First Nation bylaws or land use policies.

- 8.18 **BCR for Short Term Leases:** If the Band Council has comments about the lease, the comments should be expressed in a BCR passed within the time frame requested by the Lands Officer. The Lands Officer should carefully consider the validity and relevance of any concerns expressed by the Band Council, while being mindful that the Council does not exercise a veto over a locatee lease. Comments that relate, for example, to First Nation bylaws or concerns over pollution should be considered valid and relevant, while a comment that there has been too much leasing activity on the reserve should not. The Lands Officer is entitled to continue with the leasing process if no valid comments are received within the time frame requested.
- 8.19 **Approval of Long-term Leases:** If electors have not delegated to the Band Council the right to approve long-term leases (see section 6.7), the electors must vote to approve all leases with terms in excess of 49 years. Appropriate notice of the meeting should be posted at publicly accessible locations at least 15 days before the meeting date.
- 8.20 **Information from Meeting:** Following the vote, the Band Council should give the department the following information:
- a) a copy of the notice of the meeting; and
  - b) a BCR setting out the number of eligible voters, the number of votes cast for and against the lease, and the number of spoiled ballots.
- 8.21 **BCR when Delegation Made:** If a delegation of the electors' approval of long-term leases has been made to the Band Council, the Council should pass a BCR formally approving the lease. Such a BCR may also set out the First Nation's revenue sharing policy, or other policies relevant to the circumstances.

8.22 **Execution of the Lease:** It is suggested that 4 original leases are executed - one for the Indian Land Registry, the lessee, the locatee/First Nation, and the departmental file. The Lease should be executed in the following order:

- a) First, the Locatee **consents** (and the First Nation by way of BCR);
- b) Second, the **Lessee** executes;
- c) Finally, the **Minister's delegated authority** executes.

**Note:** If the First Nation is exercising delegated powers pursuant to s. 60, the authorized individual executes the lease. Consult the current *Delegation of Authority Instrument under the Indian Act and Related Regulations* (refer to the relevant regional delegation instrument) to determine which departmental officers are authorized to approve and sign locatee leases.

8.23 **Registration of the Lease:** The Lands Officer distributes the executed originals to the parties and sends the fully executed lease to the Indian Lands Registry in Ottawa for registration. Refer to the *Indian Lands Registration Manual* to ensure that the lease document meets all the requirements for registration.

## 9. References

9.1 For more information, refer to:

- a) Refer to Chapter 12 of this manual for Environmental considerations.
- b) *Indian Lands Registration Manual*
- c) Schedule A of the *Framework Agreement between Lands and Trust Services Department of Indian Affairs and Northern Development and Legal Surveys Division, Earth Sciences Sector Natural Resources Canada*.

**Chapter 7**

**Directive 7-3:  
Locatee Leases**

**Annex A:  
Checklist for Locatee Lease**

## Checklist for Locatee Lease

The Lands Officer, or for Section 60 First Nations, the First Nations Land Manager, should take the following steps:

1	Inform locatee of all leasing policies used for the leasing of locatee land.	
2	Obtain a fully completed "Application for Use of Land Within an Indian Reserve."	
3	Ensure that the proposed lessee has fully completed Part I of "Application for Use of Land within an Indian Reserve" and has authorized credit investigation.	
4	Pursuant to CEAA, have the departmental Environmental Specialist officer review environmental assessment provided by the proposed lessee and prepare the environmental screening report.	
5	Obtain locatee's written consent to lease by having locatee sign the "Application for Use of Land within an Indian Reserve." Where the First Nation has allotted the land to more than one locatee, the signatures of all locatees are required.	
6	Verify status of land and conduct a search in Indian Lands Registry to learn: Complete a Land Status Report to determine: <ul style="list-style-type: none"> <li>a) the status of the land;</li> <li>b) whether the land is in the lawful possession of the locatee and so registered in the Indian Lands Registry;</li> <li>c) whether any encumbrances affect the land.</li> </ul>	

7	<p>Confirm that an adequate legal description exists:</p> <ul style="list-style-type: none"> <li>i) if lease is for a term of 10 years or less, it can be described as a textual reference, however a Registration Plan is recommended. Refer to Schedule A of the <i>Framework Agreement between Lands and Trust Services Department of Indian Affairs and Northern Development and Legal Surveys Division, Earth Sciences Sector Natural Resources Canada</i> as amended from time to time.</li> <li>ii) if lease is for a term of between 10 to 25 years, is there a Registration Plan?</li> <li>iii) if lease is for a term of between 25 to 49 years, is there a Registration Plan or a CLSR Plan?</li> <li>iv) if lease is for a term in excess of 49 years, is there a CLSR Plan?</li> </ul>	
8	Initiate credit investigation.	
9	Conduct corporate status check.	
10	<p>Arrange for conduct of site inspection of land and complete the Land Inspection portion of the "Application for Use of Land Within an Indian Reserve." Confirm:</p> <ul style="list-style-type: none"> <li>a) access to the land by road or other means.</li> <li>b) the services (water, sewer and power) available.</li> <li>c) general land description and topography, confirming that the proposed site matches the land description.</li> </ul>	
11	<p>Negotiate the basic terms of the lease and incorporate these clauses into the standard lease, and then:</p> <ul style="list-style-type: none"> <li>i) provide lessee with draft copy of the lease; and,</li> <li>ii) with the assistance of Public Works and Government Services Canada, determine whether personal guarantees or performance bonds are required.</li> </ul>	

12	<p>Conduct an assessment of the lease, including:</p> <ul style="list-style-type: none"><li>a) the adequacy of the rent (based on PWGSC review of an independent appraisal provided by the proposed Lessee, if required).</li><li>b) the term (based on a review of departmental policies contained in the directive relating to the terms locatee leases).</li><li>c) the proposed use of the land (taking into consideration the requirements of "Part 2: Land Inspection" of the "Application for Use of Land Within an Indian Reserve").</li><li>d) whether all terms and conditions required by departmental policy have been included (based on standard lease document).</li><li>e) the suitability of all nonstandard clauses appearing in the lease. If necessary, obtain the advice of the Department of Justice respecting specific nonstandard clauses.</li><li>f) the potential environmental impact of the lease (based on information provided by the review by the departmental Environmental Specialist).</li></ul>	
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13	<p>Review the lease before execution to ensure that all standard terms and requirements are present, including the following terms and conditions:</p> <ul style="list-style-type: none"><li>a) The full formal name and address of the lessee;  If the lessee is a company, do the following appear:<ul style="list-style-type: none"><li>i) the name of the company, as stated in the Certificate of Incorporation/Letters Patent;</li><li>ii) the jurisdiction of incorporation;</li><li>iii) the address of the head office;</li><li>iv) authorization to enter into land transactions.</li></ul></li><li>b) Specify the applicable authority under the <i>Indian Act</i>;</li><li>c) A full and identifiable land description, including identification of any existing easements or other encumbrances;</li><li>d) The amount and period of rental payments, including:<ul style="list-style-type: none"><li>i) the date on which payment is due;</li><li>ii) if rent is to be a percentage of another quantity, the agreed method of calculation;</li><li>iii) where the term exceeds five years, specification that the rent is to be reviewed at least every five years; and</li><li>iv) whether the lease provides a mechanism for determining the rent if the parties fail to agree.</li></ul></li></ul>	
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	<ul style="list-style-type: none"><li>e) Clearly defined acceptable uses of the demised lands;</li><li>f) The standards to follow specifically in respect of :<ul style="list-style-type: none"><li>(i) construction and safety;</li><li>(ii) health; and</li><li>(iii) property maintenance.</li></ul></li><li>g) Any performance requirements,</li><li>h) Environmental provisions, such as waste or rubbish contamination, compliance with environmental standards, environmental assessments and mitigation, environmental protection, no contaminants or hazardous substances, mitigation of environmental impacts, etc.;</li><li>i) Any fencing requirements;</li><li>j) Whether the issues of dangerous objects, noxious weeds, etc. have been addressed;</li><li>k) Provision for cancellation of the lease for specified reasons;</li><li>l) Provision for the ownership of improvements at the end of lease, and who is to decide;</li><li>m) Provision of insurance at lessee's expense:<ul style="list-style-type: none"><li>(i) fire;</li><li>(ii) public liability; and</li><li>(iii) crops.</li></ul></li></ul>	
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	<ul style="list-style-type: none"><li>n) Indemnification of Her Majesty from all claims, damages, costs, etc.</li><li>o) The lessee's undertaking to pay all taxes, levies, or other charges;</li><li>p) The lessee's covenant to comply with all applicable laws, including First Nation bylaws;</li><li>q) Whether the Crown has reserved the mineral rights in, upon or under the demised lands;</li><li>r) That the lessee is given the right to hold, use and occupy the premises without interference, if the lessee pays the rent and complies with all covenants;</li><li>s) That the lessee has duly executed the lease and provided Affidavits of Execution or corporate seals;</li><li>t) Whether all sub-leases must be registered in the Indian Lands Registry if the lease is a headlease;</li><li>u) Regarding Assignments:<ul style="list-style-type: none"><li>i) whether a fee is to be paid upon assignment of the lease;</li><li>ii) stipulation that the fee must be a true reflection of expenses incurred concerning the assignment;</li><li>iii) provision that the lessee may not assign or transfer the lease without Her Majesty's consent.</li></ul></li><li>v) That upon bankruptcy or receivership of the lessee, Her Majesty may terminate;</li><li>w) That Her Majesty's representative and any other applicable authority may enter to view and inspect premises;</li></ul>	
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	<ul style="list-style-type: none"> <li>x) That where, in Her Majesty's opinion, a nuisance exists, the lessee may be ordered to stop the nuisance and pay costs thereof;</li> <li>y) Upon expiry, the lessee will peaceably surrender possession to Her Majesty;</li> <li>z) Where the lease contemplates major commercial, industrial or residential development, the following terms appear:             <ul style="list-style-type: none"> <li>i) Improvements are to revert to the lessor, or if not, evidence on file that the lessor has waived this condition;</li> <li>ii) The Lessee has submitted an acceptable development plan to the Minister prior to granting of the lease; and</li> <li>iii) The Lessee will obtain security (i.e. a performance bond) to guarantee completion of the development if required.</li> </ul> </li> </ul>	
<p>14</p>	<p>Confirm that the First Nation and the locatee have executed a revenue allocation agreement, and that the agreement is on file.</p>	
<p>15</p>	<p>For leases with terms greater than 49 years, where First Nation electors have not delegated approval, confirm that the following has taken place:</p> <ul style="list-style-type: none"> <li>a) First Nation electors voted to consider and approve the proposed lease;</li> <li>b) the vote also considered and approved the lease revenue allocation;</li> <li>c) a copy of the notice of the meeting is on file showing that it was posted 15 days before the meeting;</li> <li>d) a BCR setting out the number of eligible voters, the number of votes cast for and against the lease, and the number of spoiled ballots is on file.</li> </ul>	

16	For leases with terms greater than 49 years, where a First Nation electorate has delegated approval to the Band Council, confirm that the Council has passed a BCR formally approving the lease.	
17	<p>Review and where necessary address any concerns of the First Nation electors, or where delegation has been made, the Band Council, with respect to the following:</p> <ul style="list-style-type: none"> <li>(i) adequacy of rent;</li> <li>(ii) division of rental proceeds;</li> <li>(iii) the term;</li> <li>(iv) compliance with any reserve land use planning and valid bylaws;</li> <li>(v) possible adverse impact of the lease on the reserve in social, cultural, or economic terms; and</li> <li>(vi) concerns of the department, if any.</li> </ul>	
18	Where the Band Council and/or the First Nation electors have raised objections, have they done so within a reasonable time?	
19	Where the term of the lease is 49 years or less, confirm that a BCR is on file, which expresses the Band Council's view on the proposed lease, particularly any potential social, economic or cultural impacts on reserve and addressing compliance with approved land use plans or zoning bylaws.	
20	<p>The Lands Officer should arrange for the execution of the lease in the following order:</p> <ul style="list-style-type: none"> <li>a) First, the locatee(s) to sign the schedule to the lease, showing that they consent to the lease;</li> <li>b) Second, the lessee should execute the lease;</li> <li>c) Finally, the lease should be executed by the appropriate official under delegated authority from the Minister or by the First Nation members identified in the delegation under section 60.</li> </ul>	
21	Register the lease in the Indian Lands Registry.	

**Chapter 7**

**Directive 7-3:  
Locatee Leases**

**Annex B:  
Application for Use of Land  
within an Indian Reserve**

**Annex B**  
**Example of an Application for Use of**  
**Land within an Indian Reserve**

**PART 1** (To be completed by the Applicant)

- 1. Name in full: \_\_\_\_\_
- 2. Company name: \_\_\_\_\_
- 3. Address: \_\_\_\_\_  
\_\_\_\_\_
- 4. Company Number \_\_\_\_\_
- 5. Telephone Number: (Res.) \_\_\_\_\_  
(Bus.) \_\_\_\_\_
- 6. Directors & officers  
of the company: \_\_\_\_\_
- 7. Applicant's occupation: \_\_\_\_\_
- 8. Employer's name: \_\_\_\_\_  
Address: \_\_\_\_\_  
\_\_\_\_\_
- 9. Number of years with employer: \_\_\_\_\_

**Property applied for** (to be completed by applicant)

- 1. Band: \_\_\_\_\_  
Reserve: \_\_\_\_\_
- 2. Purpose(s) \_\_\_\_\_  
(Residential, cottage, commercial, industrial, agricultural, R/W, etc.)
- 3. Description of Land: \_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

(Attach appropriate plan or survey. Provide sufficient detail to identify location.)

**Basic Proposed Terms of Lease** (to be completed by applicant)

- 1. Proposed Commencement Date: \_\_\_\_\_
- 2. Proposed Duration: \_\_\_\_\_
- 3. Independent Appraisal completed by: \_\_\_\_\_  
Pending
- 4. Proposed Rent Offered: \_\_\_\_\_

**WE HEREBY CONSENT TO HAVING THE DEPARTMENT OF INDIAN AFFAIRS CONDUCT OR CAUSE TO BE CONDUCTED A PERSONAL CREDIT INVESTIGATION.**

Dated at \_\_\_\_\_ this \_\_\_\_\_  
day of \_\_\_\_\_ 20\_\_\_\_.

WITNESS \_\_\_\_\_ APPLICANT \_\_\_\_\_

WITNESS \_\_\_\_\_ CO-APPLICANT \_\_\_\_\_

**PART 2 LAND INSPECTION**

(To be completed by the appropriate departmental officer)

1. Description of site: \_\_\_\_\_  
\_\_\_\_\_

(General location, proximity to water frontage, river, etc.)

2. Topography: \_\_\_\_\_  
\_\_\_\_\_

(Soil, ground cover, etc.)

3. Access to public road: \_\_\_\_\_

4. Distance to nearest community: \_\_\_\_\_

5. Available services:

Water \_\_\_\_\_

Sewer \_\_\_\_\_

Power \_\_\_\_\_

Natural gas \_\_\_\_\_

Telephone \_\_\_\_\_

Garbage collection \_\_\_\_\_

Other (specify) \_\_\_\_\_

6. Present use: \_\_\_\_\_

7. Comments: \_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_  
Name, Title

\_\_\_\_\_  
Signature

\_\_\_\_\_  
Date



**PART 3 LAND STATUS REPORT**

Reserve Name: \_\_\_\_\_ No.: \_\_\_\_ **First Nation:** \_\_\_\_\_

Proposed Purpose (check box):

<input type="checkbox"/> Band land Lease	<input type="checkbox"/> Permit
<input type="checkbox"/> Locatee land Lease	<input type="checkbox"/> Designation
<input type="checkbox"/> Easement	<input type="checkbox"/> Section 35 Transfer
<input type="checkbox"/> Other: (specify) _____	

**Legal Description** (attach copy of plan and/or NRCAN letter of description to Land Status Report):

Lands: Lot \_\_\_\_\_ Block \_\_\_\_\_ Plan No. \_\_\_\_\_ (RS/CLSR)

Textual Description: \_\_\_\_\_  
 \_\_\_\_\_  
 \_\_\_\_\_

**Status of Land** (check box (es) if applicable):

- Band Land (not designated or Surrendered); or,
- Designated Land; or
- Locatee Land.

If **Designated Land**, Complete the following (attach copy of designation to Land Status Report):

Number Order-in-Council: P.C \_\_\_\_\_ - \_\_\_\_\_

Date of Order-in-Council: \_\_\_\_\_

ILR Registration No: \_\_\_\_\_

Term or Period of Designation: From \_\_\_\_\_ (m/d/y) To \_\_\_\_\_ (m/d/y)

Purpose(s) of Designation: \_\_\_\_\_  
 \_\_\_\_\_

Conditions of Designation: \_\_\_\_\_  
 \_\_\_\_\_

If **Locatee Land**, Complete the following: (attach copy of documentation, including Parcel Abstract to Land Status Report):

Locatee: \_\_\_\_\_  
 Last name First name Band No.

Address: \_\_\_\_\_  
 Street City Postal Code

Locatee's phone no.: \_\_\_\_\_ (h) \_\_\_\_\_ (w) \_\_\_\_\_ (cell)

Lawfully Held by:(check box)

CP - ILR Registration No: \_\_\_\_\_ ; or,  
 NE - ILR Registration No: \_\_\_\_\_ ; or,  
 NETI - ILR Registration No: \_\_\_\_\_ ; or,  
 Cardex - ILR Registration No: \_\_\_\_\_ ; or,

**Encumbrances** (attach documentation, including Reserve General Abstract, to Land Status Report):

List of registered instruments which may affect this parcel: (check box)

Lease - ILR Registration No: \_\_\_\_\_ ; or,  
 Permit - ILR Registration No: \_\_\_\_\_ ; or,  
 Surrender - ILR Registration No: \_\_\_\_\_ ; or,  
 Easement - ILR Registration No: \_\_\_\_\_ ; or,  
 Section 35 - ILR Registration No: \_\_\_\_\_ ; or,  
 Cardex: - ILR Registration No: \_\_\_\_\_ ; or,  
 \_\_\_\_\_ - ILR Registration No: \_\_\_\_\_ ; or,  
 \_\_\_\_\_ - ILR Registration No: \_\_\_\_\_ ; or,

**Comments and/or matters to be dealt with:**  
 \_\_\_\_\_  
 \_\_\_\_\_

I have reviewed the proposed land transaction and have searched the Indian Lands Registry records relating to the parcels affected by this transaction. According to these records the proposed transaction: (check box)

will **not** cause a conflict with existing registered interests;  
 will cause a conflict with existing registered interest as identified herein, and must be dealt with as per comments above.

\_\_\_\_\_  
 Name, Title Signature Date

**Band Council RESOLUTION AND CONSENT**

**(Sample wording)**

\_\_\_\_\_ The Council of the \_\_\_\_\_ Band do hereby resolve and consent to the granting of a \_\_\_\_\_ (lease, permit) \_\_\_\_\_ by the Minister of Indian Affairs and Northern Development of the lands as described in Schedule "A" attached, for a term of \_\_\_\_\_ years, for the benefit of \_\_\_\_\_ (band, locatee) \_\_\_\_\_ under terms and conditions as described in Schedule "A" attached.

\_\_\_\_\_  
(Chief)

\_\_\_\_\_  
(Councillor)

\_\_\_\_\_  
(Councillor)

\_\_\_\_\_  
(Councillor)

\_\_\_\_\_  
(Councillor)

\_\_\_\_\_  
(Councillor)

\_\_\_\_\_  
(Councillor)

A quorum for this band consists of \_\_\_\_\_

Dated at \_\_\_\_\_ this \_\_\_\_\_  
day of \_\_\_\_\_ 20\_\_\_\_.

### LOCATEE APPLICATION

I, \_\_\_\_\_, No. \_\_\_\_\_, of the \_\_\_\_\_  
\_\_\_\_\_ Band state:

1. I am now in lawful possession of the lands described in Schedule "A" attached and hold a (Certificate of Possession, Notice of Entitlement), which is registered in the Indian Land Registry under number: \_\_\_\_\_.
2. I now apply to the Minister of Indian Affairs and Northern Development pursuant to ss \_\_\_ of the *Indian Act*, to grant a (lease, permit) for these lands for a term of \_\_\_\_\_ years for my benefit, under terms and conditions described in Schedule "A" attached.
3. I hereby undertake to vacate such lands to enable the Lessee to take possession of them prior to the execution of the (Lease/Permit).
4. (other applicable clauses).

_____ Witness	_____ Signature	_____ Date
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_____ Locatee	_____ Signature	_____ Date
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## Directive 7-4

# General Guidelines for Drafting Leases

### 1. Purpose

- 1.1 This directive discusses the general policy and procedures for negotiating and drafting leases of reserve land. General drafting guidelines are set out in Annex A to this directive. Specific drafting guidelines for particular kinds of leases are found in: Annex B (Commercial/Industrial Leases), Annex C (Residential and Cottage Leases), and Annex D (Agricultural Leases).

### 2. General

- 2.1 **Before Reading This Directive:** Review Directive 7-1: Leasing Reserve Land - An Overview, which will serve as a roadmap for navigating within Chapter 7. Directive 7-1 discusses the legal framework underlying leases, and offers an overview of the leasing mechanisms under the *Indian Act*. It also contains helpful definitions of terminology that will be found throughout this chapter.
- 2.2 **Leases of Designated Land and Locatee Leases:** For specific policy and process considerations about the leasing of designated land and locatee leases, refer to Directive 7-2: Leasing Reserve Lands Using Designation, and Directive 7-3: Locatee Leases.
- 2.3 **Terminology:** Throughout this directive, the phrase "lease document" includes the basic lease agreement itself, and, as appropriate, all other supporting documents and related agreements. The words "must", "shall" or "will" refer to actions that are mandatory. The word "should" refers to actions that are strongly recommended, and the word "may" to actions that are optional.
- 2.4 **Definitions**
- a) **Capital Improvement Investment** refers to the amount that a lessee is required to invest in the leased premises to create or improve capital items such as buildings, fences and roads.

## Definitions (continued)

- b) **Capital Recapture Period** is, for commercial leases, the length of time the lessee will require to repay, from revenues, the capital improvement investment made in the leased property. For non-commercial leases, this should be considered as the period during which the lessee's investment in improvements to the property is deemed to be repaid, either by loan repayment or through enjoyment of the use of the capital item.
- c) **Discount Rate** means the rate by which prepaid rent payments are reduced to reflect their present value.

**Discount Rate Example**

If:

Rent = \$10,000 per year

Rent is prepaid for 2 years

Market interest rate for investors is 10%,

The value today of the rent that is due in the second year is equal to \$10,000 less the 10% investment rate (the "discount rate"), which equals \$9,090.91.

This means that if you invest \$9,090.91 today at a return of 10%, that investment will be worth \$10,000 in one year (which is the date that the rent for the second year is payable).

$\$10,000 = \$9,090.91 + \$909.09$  (which is 10% of \$9,090.91)

Therefore, at the beginning of the first year the lessee would prepay the rent of \$10,000 per year for two years by prepaying a total of \$19,090.91)

- d) **Gross revenue** is the total revenue earned before deduction of taxes and expenses.
- e) **Lessee revenues** are revenues generated by the lessee from commercial activity on the leased premises
- f) **Rental Yield** is the rental return generated by the lease.
- g) **Right of Renewal** means the right to obtain an extension of the lease term, at a specified rent, generally under the same terms and conditions as set out in the original lease.

**Definitions (continued)**

- h) **Seasonal Recreational Lease** refers to a recreational/cottage lease which specifies that the leased land can only be used for part of the year. For example, such a lease might restrict use of the leased land to only the winter months.

**3. Policy**

3.1 **Objectives of Leasing Guidelines:** The leasing guidelines set out in this Directive and its annexes are designed to accomplish several objectives, and following these guidelines wherever possible is therefore important. If deviations from the guidelines are required, Headquarters should be consulted. Among the objectives which the guidelines are designed to achieve are:

- a) the protection of the interests of the First Nation, a locatee, and/or the department.
- b) prevention of abuses by the lessee.
- c) facilitation of economic development and revenue generation by the First Nation and locatee.
- d) use of procedures that reflect current legal trends, case law and applicable legislation.

**4. Process**

4.1 **Use the Correct Lease Form:** Every lease is classified by the type of activity the land will be used for, and contains specific clauses that take into account the special needs of that activity. It is therefore very important to ensure that an appropriate, departmentally approved, standard lease form is used as the basis for negotiating the lease.

**Correct Lease Form (continued)**

Based on the different activities the land can be used for, the three types of standard leases commonly encountered are:

- a) **Commercial Leases:** This type of lease is used when the leased property is intended for commercial or industrial ventures. Commercial activity would include use of the land for a shopping centre, manufacturing facility, restaurant, water or theme park, gas station, retail sales outlet, or mobile home park. The commercial lease is also appropriate for major multi-family residential projects, such as a condominium, apartment building or subdivision development;
- b) **Residential and Cottage Leases:** This type of lease reflects the special requirements attached to leasing land for single family use, or for seasonal or year-round cottage recreation; and
- c) **Agricultural Leases:** This type of lease is appropriate for leasing land to graze livestock and to grow agricultural crops. Remember that most grazing and cash crop arrangements are now dealt with by using ss. 28(2) permits.

4.2 **Signing the Lease Document:** The Lands Officer must ensure that the execution of the lease meets registry requirements. The following guidelines must be followed to ensure valid execution of the lease document:

- a) **Signature** - All signatures on a lease document must be signed in permanent ink. The lessee must sign the contract using his or her normal signature, although this signature does not have to be identical to the lessee's full name, as recited as a Party at the beginning of the contract. Where applicable, it should be stated that an original or notarial true copy of the signing authority of any individual signing on behalf of another is attached;
- b) **Signing with a "mark"** - If a lessee signs with a mark, such as an "X", two witnesses must witness that mark. One witness must complete an affidavit that states that the lease was read to the lessee, that the lessee appeared to understand its contents, and that the witness saw the lessee make the mark;



## Signing the Lease Document (continued)

- c) **Execution by Department or First Nation** - All lease documents must be executed on behalf of the Crown by the authorized signing officer. If there has been no delegation under sections 53 and 60 of the *Indian Act*, this will be the departmental officer who has received the proper delegated authority as set out in the *Delegation of Authority Instrument under the Indian Act and Related Regulations* (refer to the appropriate regional delegation instrument). If there has been a delegation under sections 53 and 60 to the First Nation, the lease will be signed by the individual authorized to do so under the terms of the delegation;
- d) **Execution by Corporation** - The corporation's officer(s) signing the lease document must indicate his or her name and position and attach a copy of the authorizing corporate minutes or bylaw, to be registered with the lease. The seal of the company should be affixed, failing which the appropriate "Acknowledgement of an Officer" form should be completed and attached to the lease;
- e) **Execution by Partnership** - The lease document should, if possible, be signed by all partners, although the signature of one partner is sufficient to bind the partnership unless the partnership gives notice to the contrary;
- f) **Execution by Trustee, Guardian or Administrator** - A guardian, trustee or the administrator of an estate must sign the lease document using his or her normal signature and must identify the capacity in which he or she is signing;
- g) **Execution by Individual in Different Capacities** - When a person is acting in two or more different capacities, the lease document must be separately executed by that person in those different capacities;
- h) **Witnesses** - All signatures for the Lessee should be witnessed;
- i) **Changes** - All changes made to a lease document, whether by correction, addition, deletion or otherwise, must be initialled by all parties at the time of execution. Any changes made after the execution of the lease document are amendments, and must be made by means of an amending agreement.

**Signing the Lease Document (continued)**

- j) **Order of Execution** - The Lands Officer should arrange for the execution of the lease in the following order:
  - a) First, if this is a locatee lease, the locatee(s) to sign the schedule to the lease, showing that they consent to the lease;
  - b) Second, the lessee should execute the lease;
  - c) Finally, the lease should be executed by the appropriate official under delegated authority from the Minister or by the First Nation members identified in the delegation under Section 53 or 60.

**Chapter 7**

**Directive 7-4:  
General Guidelines for Drafting Leases**

**Annex A:**

**General Guidelines  
for Drafting Leases**

## Annex A

# General Guidelines for Drafting Leases

1. **General Format Guidelines:** Follow these general format guidelines when drafting any type of lease:
  - a) **Paper** - All leases and related documents must meet Indian Lands Registry guidelines, and be no smaller than 21.6 mm x 27.95 mm (8.5" x 11") in size.
  - b) **Printing and Different Prints** - All lease documents should be word-processed, typewritten or in printed form. The originator of a lease document is always the Lands Officer, or a First Nation with section 53/60 delegation. The Lands Officer should never accept a draft lease from a proponent as a precedent. Any proposed changes by a potential lessee or First Nation should be incorporated into the standard lease and highlighted with redline/strike-out for clarity of negotiations and internal discussions.
  - c) **Grammar** - All lease documents should be grammatically correct and should contain neither spelling nor typographical errors, nor ambiguous or conflicting statements;
  - d) **Blank Pages and Spaces** - The parties should rule off and initial all blank pages or unusual spaces;
  - e) **Execution of the Lease:** It is suggested that 4 original leases be executed - one each for the Indian Land Registry, the lessee, the locatee/First Nation, and the departmental file. The lease should be executed in the following order:
    - i) First, if a locatee lease, the Locatee **consents** (First Nation consents by way of BCR);
    - ii) Second, the **Lessee** executes;
    - iii) Finally, the **Minister's delegated authority** executes.

- 2. Parties to the Lease:** The following requirements and information relating to parties should be considered when drafting the lease document:
- a) **Referring to the Crown** - Identify the Crown as "Her Majesty the Queen in right of Canada, hereinafter called "Her Majesty"." The Crown may also be called the "Lessor" or "Grantor." The lease should contain a statement that Her Majesty is represented by the Minister of Indian Affairs and Northern Development or his authorized representative;
  - b) **Number of Parties** - Although a lease generally involves two parties - the lessor and the lessee - there may on occasion be additional parties, such as a guarantor;
  - c) **Identifying Parties** - Identify parties to a contract by their full legal names and their postal addresses. Parties must be identified in exactly the same manner throughout the document. The first party listed is the lessor, and the second party is generally the lessee.
  - d) **Joint Tenants and Tenants in Common** - Where there is more than one lessee, the lessees can hold their interest in the land as joint tenants or as tenants in common (see Directive 7-1, paragraph 12 for more information). Whether the lessees will hold the land as "joint tenants" or as "tenants in common" must be stated in the lease document. If the lease contains no such statement, a tenancy in common is created. Joint tenancy is not permitted in the Province of Quebec;
  - e) **Changes** - Any changes in the status of a party, such as his or her name, address or capacity, should be immediately conveyed to the other parties to the lease. If a second, related lease document is drafted (i.e. a mortgage), the second document must refer to the change of name, and a statutory declaration may be required. Before recognizing a change in the name of a corporation, the corporation must give the department a copy of the name change certificate. The appropriate federal or provincial registrar issues the name change certificate under the relevant companies legislation.
  - f) **Corporations** - As set out in our standard leases, the following information should be provided with respect to a corporate party: the registered name of the company as it appears in the Certificate of Incorporation or Letters Patent; the province in which it is incorporated; and the full postal address. In addition, the corporation's Articles of Incorporation must authorize the corporation to carry on business in the province where the land to be leased is found, and to enter transactions involving land;

**Parties to the Lease (continued)**

- g) **Partnerships** - The lease must state the partners' surnames, given names, business name and business postal address in full. The business name must be preceded by the words "Operating under the firm name and style of . . .";
- h) **Agents** - Following the full name and a postal address, the words "as Agent for ...[the full name of the party for whom the agent is acting]..." should appear. Anyone signing for another individual should attach an original or notarized true copy of the document which authorizes them to do so;
- i) **Trustees** - Following the full name and a postal address, the words "as trustee for . . . [the full name of the party for whom the trustee is appearing] . . ." should appear. The lease should also include a statement concerning the reason for the trust. A notarized copy of the trust document should be attached;
- j) **Guardians** - Following the full name and a postal address, the words "as lawful guardian of . . . [the minor or mentally incompetent party] . . ." should appear. An original or notarized copy of the guardianship document should be attached;
- k) **Administrators and Executors** - Following the full name and a postal address, the words ". . . [the administrator or executor] of the estate of . . . [the party for whom the agent is acting] . . ." should appear. An original or notarized copy of the Letters of Probate or Letters of Administration should be attached; and
- l) **Age of the Parties** - Except where otherwise required by the *Indian Act* or regulations, the age of majority is determined by reference to the prevailing provincial age of majority where the person resides.

**3. The Lease Recitals:** The lease recitals are statements of relevant facts concerning the land or the circumstances, appearing after the identification of the parties and before the clauses of the lease. Where relevant to the particular lease, the following items *must* appear in every preamble:

- a) **Statement as to Reserve Lands** - A statement, saying that the lands to be leased are reserve lands or designated lands, as may be, which have been set apart for the use and benefit of the First Nation;

## Lease Recitals (continued)

- b) **First Nation Consent** - The number and date of the Band Council resolution (BCR) approving the lease, as applicable;
- c) **Designated Land** - The date of the designation and the date and number of the Order-in-Council accepting the designation;
- d) **Locatee Information and Consent** - To acknowledge his or her agreement with the terms of the lease, the locatee must either sign a schedule to the lease, or put his or her signature on the back of the lease, with a statement in the recitals that the locatee is signing the back;
- e) **Chain of Events** - Where a lease has been assigned, mortgaged, amended, an addendum added, or the legal description has changed: a recitation of the complete chain of events leading up to the present transaction and containing the dates of previous contracts, Indian Lands Registry registration numbers, the parties involved, and a complete legal description of the land; and
- f) **Indian Act Authorization** - The lease recitals should always state the section of the *Indian Act* or regulations which authorizes the lease. For example, for a locatee lease, the recital should refer to ss. 58(3).

**4. Supporting Documentation:** Beyond the lease contract itself, the leasing process can involve several supporting documents, such as affidavits, BCRs, schedules and applications. With respect to supporting documents the following should be kept in mind:

- a) **Documents Referred to in the Lease** - Attach to the lease any supporting documents referred to in the lease;
- b) **Compatibility with Designation and BCRs** - The lease must follow verbatim the terms of any designation or BCR related to the lease. Therefore, no ambiguity or contradiction will exist between any supporting documents and the lease, the designation and the BCR. If following the terms of the designation or BCR is legally impossible, then a new designation or BCR should be obtained;

## Supporting Documentation (continued)

- c) **Locatee Application and Consent** - To lease locatee land, a locatee must, pursuant to ss. 58(3) of the *Indian Act*, apply to the department to have his or her land leased. This requirement can be satisfied by a schedule to the lease or by having the locatee signify his or her consent to the lease by signing the "Application for Use of Land within an Indian Reserve" and attaching that application to the lease. The locatee's signature must be witnessed, and the witness's signature must appear on the consent document. If the locatee is deceased, mentally incompetent or a minor, then the locatee's legal representative must consent on behalf of the locatee. Attach an original or notarial true copy of the document appointing the legal representative to the lease as well. Refer to Directive 7-3: Locatee Leases, for more information on the completion of the Application;
- d) **Mortgagee's Consent** - The mortgagee's consent must be obtained to any transfer or amendment of the lease's land description or use. Refer to Directive 7-5: Assignments, Sub-leases and Mortgages;
- e) **Power of Attorney** - A Power of Attorney granted by a party to a lease must be registered in the Indian Lands Registry. It can be registered either in its own right or against any lands that it affects. A copy of the Power of Attorney should be attached to the lease;
- f) **Death of a Lessee** - To transfer the leasehold interests of a deceased lessee, Letters of Probate or Letters of Administration are required before the administrator or executor can assign the lease to the heirs. The administrator or executor can then assign the lease. Where one lessee in a **joint** tenancy dies, the department only requires the Death Certificate to transfer the lease to the surviving lessee(s). These documents should then be registered in the Indian Lands Registry. Joint tenancy is not permitted in the Province of Quebec;
- g) **Dating Documents** - All supporting documents must be dated; and
- h) **Signatures** - Where signatures are required, supporting documents should be signed. BCRs made in support of a lease must bear the original signatures of a quorum of the Band Council.



## 5. Content of Leases

5.1 **General:** Departmentally approved standard leases will provide the specific wording for lease clauses to be used in commercial, residential/cottage and agricultural leases. In negotiating leases, remember that clauses are not subject to change without consultation with regional Lands Policy, and/or departmental Headquarters in Ottawa. The variable or negotiable elements of a lease, such as legal description, term and rent, are discussed in Annex A. The following paragraphs outline the basic terms, conditions and content requirements of those general elements which must be set out in the lease. Indications of any special considerations unique to the type of lease used are also discussed.

### 5.2 Land Description

5.2.1 **Generally:** The description of the land is a very important part of the lease, as accurately identifying the parcel of land is crucial, both for registration purposes and to ensure that the lessee is in fact using the correct land. The description of the lands should also identify any existing easements or encumbrances which affect the land. However, it is the lessee's responsibility to pay for and verify the accuracy of the description.

5.3 **Types of Descriptions:** The description of the land set out in the lease must meet the requirements contained in Schedule A of the *Framework Agreement between Lands and Trust Services Department of Indian Affairs and Northern Development and Legal Surveys Division, Earth Sciences Sector Natural Resources Canada*. In the preliminary stages of the project, refer to the Interdepartmental Agreement in effect at the time to identify the survey product required to register the transaction in the Indian Lands Registry. In most cases, leases must be described by either Registration Plan or CLSR survey.

- 5.4 **Access to Landlocked Parcels:** Access must be provided for any lands that may become landlocked as the result of a lease. “Landlocked” describes land belonging to one person, which is surrounded by land belonging to other people. The land cannot be approached except over the other person’s land. If the landlocked parcel is locatee land, the Land Officer should obtain the locatee’s written consent to the method of access. If the landlocked parcel is First Nation land, then a BCR consenting to the method of access should be obtained. The lease must identify the access route, which may be done in a recital following the description, such as:

**Sample Wording for Access to Landlocked Parcel**

... reserving a right of way 3 metres(9.75 feet) on either side of a centre line between point A on [the landlocked parcel] to point B on [the public access] . . .

The agreement for access, such as a locatee right of way agreement, Band Council Resolution, or Section 28(2) Permit, must be registered with the lease, and against the landlocked parcel as well.

- 5.5 **Subsequent Transactions:** Subsequent transactions such as a modification of lease agreement, must refer to the land in exactly the same wording as was used in the original contract unless the same land is redefined on an official plan of survey. If the land is redefined, then the original description, with reference to the new description, should be used. For example:

**Sample Wording Where Description has Changed**

... formerly Lot 6 Plan 12345 CLRS, now known as Lot 6-1 Plan 1234R

- 5.6 **Transfers** - A lease document subletting part of the lands held under a headlease, must refer to the headlease. That reference must include the description of land held under the headlease. The portion to be sublet must be accurately and clearly defined by a Registration Plan or a CLSR survey.

## 6. The Term of the Lease

- 6.1 **Commencement Date:** The term of a lease must state the date of commencement by reciting the day, month and year.
- 6.2 **Termination Date or Duration:** The date of termination of a lease must be clearly set out by reciting the day, month and year of termination or the duration of the lease.
- 6.3 **Designated Land:** A lease of designated lands **cannot extend beyond the date of termination of the designation.** If the term of the lease extends to the last day of the term of the designation, the lease must state that it will lapse on the last day of the term of the lease, without any further notice by the lessor.

## 7. Right of Renewal

- a) If a right of renewal is granted, it **must be exercised before the expiry of the lease** and must be exercised **strictly in the manner provided for** in the lease, or the right will lapse.
- b) A renewal may never extend beyond the date of the termination of the designation.
- c) A renewal must not extend the total term of a locatee lease beyond 49 years, because a locatee lease cannot extend beyond 49 years without a First Nation vote.
- d) The Department of Justice should be consulted on any renewal clause.

## 8. Rent and Other Consideration

- 8.1 **General:** Consideration is the benefit that the lessor receives in exchange for the granting of a lease. Consideration must appear in every lease, and it can be monetary, "in kind," "in service" or any of the preceding in combination. "In kind" consideration gives the lessor the same benefit received by the lessee, such as the lease of one parcel in exchange for the lease of a second parcel. Consideration "in service" involves the provision of a service in exchange for granting the lease. Monetary consideration must be payable in legal tender of Canada. Non-monetary consideration should be clearly specified, setting out, for example, the exact percentage of a crop to be received, and when and where it is to be delivered.

- 8.2 **Fair Market Rent:** All consideration should be based upon the fair market value of the land, and unless explicitly stated, every designation **must require** that a fair market rent be obtained from the lessee. **A First Nation corporation** that is leasing designated land **may receive special terms** as part of an overall economic strategy that benefits the First Nation. Where the lessor gives this type of benefit to the lessee, it must be set out in the designation (or where the lease involves locatee lands, the locatee must give written consent in the consent document). A locatee corporation which leases locatee land may also receive special terms. The locatee must specifically consent to the special terms in the locatee's consent document.
- 8.3 Charging reduced or nominal rent is an example of a special term which may be given to a First Nation corporation. In such a case, the designation must specify the First Nation corporation **and** provide for the reduced rent. If the intention to charge reduced or nominal rent is considered before the designation referendum, the First Nation must be informed of that intention at an information meeting.
- 8.4 **Deviations from Fair Market Rent:** Any departure from fair market rent should be justified by the proposed lessee, approved in writing by the locatee or the Band Council (as may be), and recommended for approval by the Lands Officer. The Band Council or locatee should also be advised to seek independent legal or financial advice before accepting less than fair market rent. When land is conveyed for commercial purposes by way of a headlease, with the intention of allowing sub-leases, less than fair market rent may be charged on the headlease. This will allow the head lessee, usually a development corporation, to finance its operations out of the fair market rent charged to the sub-lessees.
- 8.5 **Participation Rent:** Participation rent is rent based upon the revenue earned by the lessee. The matter of participation rent should always be referred to the Department of Justice for advice, as in certain circumstances such an arrangement could categorize the Crown as a joint venturer with the lessee, and expose the Crown to future liability. By way of illustration only, the following is a sample participation rent clause that might be contained in a shopping centre lease:

**Sample Clause for Participation Rent (Not approved for use)**

...The lessee will pay, on the 15th day of each month in advance for the following month, a sum equal to 6% of the gross sales in dollars of all merchandise sold by the lessee on the premises during the preceding calendar month . . .

- 8.6 **Rent Reviews:** A lease may, and a lease more than five years must, provide for a review and adjustment of the rental payable which **must be repeated at a minimum every five years for the term of the lease**, but can take place more frequently. If the term of a lease exceeds five years, the first rent review must take place within five years of the commencement of the lease. Refer to departmentally approved standard lease forms for the criteria used in rent reviews.
- 8.7 When providing for rent review, **using what is called a ratchet clause is permissible**, subject to the comments that follow. A ratchet clause provides that during subsequent rent reviews, the rent to be charged may be higher than the current rent should fair market values rise, but may never be lower than the current rent, even if fair market values fall. The following is a sample clause:

#### Sample Ratchet Clause for Rent Review

The Lessee will pay as Rent the following amounts in advance annually on the 1st day of March during the term, except that the first such payment is to be made before the signing of this lease by the parties:

- a) during the "first period" the Lessee will pay the sum of one thousand (\$1,000.00) dollars per annum;
- b) for the second and each subsequent Period commencing in 1997, the rent will be the greater of:
  - i) the annual Rent which the Minister determines to be the Fair Market Rent for the respective Period; and,
  - ii) the same annual Rent as due in the last year of the immediately preceding period

## 8.8 Other Terms and Conditions

- 8.8.1 **Improvements:** A lease must always state whether improvements become the property of Her Majesty or the lessee upon expiration or termination of the lease. As a rule, improvements made under a lease, such as buildings, should revert to the Crown. This is one benefit to the lessor of leasing, and is usually provided for by the lessee's accounting method. If the lessee must remove improvements at the expiration of the lease, the lease should clearly state that the lessee must remove the improvements by a certain time, failing which the improvements will revert to the Crown, and may be removed at the lessee's expense.
- 8.8.2 **Confirming Boundaries Before Commencing Improvements:** A lessee is responsible for determining and marking the boundaries of the leased lands before adding any improvements. This is so even if the land was fully monumented for an official survey under the *Canada Land Surveys Act*.
- 8.8.3 **Insurance:** The lessee will be called upon to maintain full replacement value insurance for fire and other perils, plus appropriate levels of public liability insurance. How much liability insurance to carry depends on the nature of the activity that will take place on the leased land. A commercial lease should require a minimum of \$3,000,000 (three million dollars), while \$1,000,000 is sufficient for a residential/cottage lease or agricultural lease. The onus is always on the lessee to show why liability insurance should be below these levels.
- 8.8.4 **Development Plans and Performance Bonds:** For projects involving the construction of a building or other significant development, a development plan must be obtained. A performance bond may be required where the project costs are greater than \$50,000. (Consult with Public Works and Government Services Canada if necessary)
- 8.8.5 **Guarantors:** Generally, where the lessee is a corporation created specifically to lease a particular parcel of land, or has limited assets, standard business practice requires that the principal shareholders of the corporation become parties to the agreement as guarantors. In other cases, a guarantee may be required where the corporate lessee: is in financial difficulty; is heavily financed; has a poor track record; has recently changed its structure or ownership; or has made excessive use of bankruptcy legislation.
- 8.8.6 **Mineral Rights:** Leasing the surface of reserve lands does not impact the rights relating to mines, minerals and subsurface materials. These rights are reserved to the federal or provincial Crown, and accordingly the lease must state that the Crown reserves the right to drill for, remove and dispose of the materials found in or under the leased lands.

- 8.8.7 **GST:** The Lease must state that the Lessee is required to pay all applicable taxes, including GST. Refer to departmental guidelines on the structure and payment of the federal Goods and Services Tax.

**Chapter 7**

**Directive 7-4:  
General Guidelines for Drafting Leases**

**Annex B:**

**Guidelines for Commercial/Industrial Leases**



## Annex B Guidelines for Commercial/Industrial Leases

### 1. Term

- 1.1 **Length:** The recommended term for major commercial or multi-family residential developments, such as an apartment, row house, townhouse or condominium development, is 49 to 99 years. To determine what constitutes a major development, refer to local market conditions and industry standards.
- 1.2 **Considerations:** A number of considerations will impact on the length of the term that should be granted in a commercial lease. Among these considerations are the following:
- a) The **capital improvement investment by the lessee** - As the investment increases, so too should the term of the lease;
  - b) The lessee's **capital recapture period** - As the capital recapture period increases, so too should the lease term;
  - c) The **availability of similar sites off-reserve** - If similar sites are available off-reserve, a longer term may be appropriate;
  - d) The **future potential of the site** - If the site has significant future potential, perhaps with a different use, the term should be limited to increase flexibility; and
  - e) The **type of development** - Some kinds of developments will require a longer term to facilitate economic success.

### 2. Rent

- 2.1 **Timing of Payments:** The guidelines for the timing of payments for commercial leases should be as follows:
- a) **Basic rent** is payable annually in advance;
  - b) **Percentage participation rent**, if any, is generally payable at the end of the fiscal year of the operation;

- 2.2 **Rental Yield:** The amount of rent to be charged should be based upon the following considerations, which are usually assessed by the First Nation's independent financial advisor and PWGSC if required, in complex lease situations:
- a) The yield should reflect a **percentage return** on the market value of privately owned land with similar characteristics, as if it were held by the First Nation or locatee, and zoned for the appropriate use. The percentage return should be based on indices such as the Chartered Bank's prime lending rate or the first mortgage rate;
  - b) In leases for revenue producing developments, the lease should provide for, in addition to annual land rental based on market value, a **percentage participation** in the revenues generated by the head-lessee. Ideally, for control reasons, this percentage will be based on gross revenues; and
  - c) If **prepayment of the entire lease term** is undertaken, this amount should estimate the current market value of the land plus an additional amount which represents a bonus for the privilege of pre-paying the lease and avoiding future increases in rent. Prepayment should be used with caution, however, as there is a risk that the amount prepaid may not reflect the full value of the lease over the specified term. The Lands Officer should consult with the Department of Justice, and obtain a waiver or Certificate of Independent Legal Advice from affected locatees, or the First Nation, if pre-paid rent is accepted for long-term leases.
- 2.3 **Rent Review:** The following guidelines should be followed when scheduling rent reviews:
- a) rent reviews are required every five years as a minimum, and can occur more frequently;
  - b) If capital improvement investment is high, and the capital recapture period is over 35 years, then a review period of less than five years will not be appropriate during the period of construction.
  - c) If the rent at review is to be based upon unimproved lands, a photograph must be taken of the unimproved site, dated and filed for use by future appraisers. It should be remembered that, under the terms of the standard lease or the departmentally approved equivalent, the lessee generally has a right of appeal to the Federal Court if he/she does not agree to the fixed rent at review.

- 2.4 **Use Clause:** The permitted use, form, size and density of the development should be clearly set out in the lease. Items such as floor area ratio, rentable area, the number of buildings, number of units, etc., should be dealt with.

### 3. Special Terms and Conditions

- 3.1 **Development Plan:** Where the lease proposal involves a major development, the lessee, including a First Nation corporation, should provide a Development Plan acceptable to the department prior to execution of the lease. The Plan must show the type of development contemplated, the timing and phasing of the stages of the development, a schedule of construction, and the investment for each phase. This Plan should be reviewed by Public Works and Government Services Canada if necessary, and should be annexed to the lease to become part of it.
- 3.2 **Performance Bond:** Where a development plan is required, the lessee, including a First Nation corporation, should provide the Minister with a performance bond to guarantee completion of the project. This will ensure that the lessee has the necessary resources to complete the project. Refer to regional guidelines on the use of performance bonds, which have been created with local standards in mind.
- 3.3 **Insurance:** The lessee should maintain suitable fire insurance, as required by the standard lease or the departmentally approved equivalent, and a minimum of \$3,000,000 public liability insurance.
- 3.4 **Major Industrial Leases:** These are leases which will have a major environmental impact on the reserve and may create regulatory gap issues. These leases must be approved by Senior Policy Committee at Headquarters prior to approval. See Chapter 5 for further details.

**Chapter 7**

**Directive 7-4:  
General Guidelines for  
Drafting Leases**

**Annex C:**

**Guidelines for  
Residential and Cottage Leases**

## Annex C Guidelines for Residential and Cottage Leases

1. **General:** The Lands Officer should apply the following guidelines with discretion, as dictated by local markets and standard practices.
  - 1.1 **Term/Length:**
    - a) **Cottage (Seasonal Recreational):** Terms of five to twenty years, including all options and renewals;
    - b) **Cottage (Year Round Recreational):** Terms of twenty to forty nine years, including all options and renewals;
    - c) **Single Family Principal Residence:** Terms of thirty to forty nine years, including all options and renewals, for residential subdivision lots;
2. **Considerations - Seasonal Cottage:**
  - a) **Shorter terms Leases:** Leases of up to five years will generally produce lower quality subdivision and minimize income. However, the land will be available for changes in use;
  - b) **Longer Term Leases:** A twenty year lease will produce a higher quality of subdivision due to the longer tenure, and will attract higher capital investment. That higher investment should be a condition of a long-term lease. While dollar return may be maximized by the longer term, there is less flexibility afforded in the long-term use of the land.

## 2.1 Considerations - Year Round Cottage:

### a) Considerations - Single Family Principal Residence:

- i) The capital improvement investment should be set at a minimum of \$30,000. This figure should be amended from time to time to reflect changes in conditions, market or otherwise;
- ii) A Capital Recapture period of at least 25 years is recommended.

## 3. Rent

3.1 **Timing of Payments:** Rental payments should be paid annually, in advance, with the possibility of prepayment to a maximum of five years. However, if the rent is sufficiently low to be prepaid every 5 years, it should be reviewed as to whether the rent reflects fair market value, based on an independent appraisal.

3.2 **Prepayment:** Prepayment, while acceptable for year round recreational and single family principal residence, is often not desirable, for the following reasons:

- a) While the lessor receives the revenues at the outset, it incurs continuing administrative responsibility;
- b) The prepayment amount will be discounted from what the First Nation would have received if annual payments were in force for the term;
- c) Rental review is prevented, as is the ability to maintain a current return on the basis of current land capital value.

3.3 **Rental Yield:** The amount of rent to be charged should be based on an independent appraisal, and considering the following:

### 3.4 Seasonal and Year-Round Cottage Leases

- a) The yield should reflect a **percentage return** on the market value of freehold land with comparable characteristics, as if full title was held by the First Nation or locatee, and zoned for the proposed use. For example, if a reserve lot could be purchased for \$10,000, that is the value to which the percentage return should be applied. The percentage return will vary in different areas of the province.

### 3.5 Single Family Principal Residence

- a) **Annual Payments:** The yield should reflect a **percentage return** on the market value of freehold land with comparable characteristics, as if full title was held by the First Nation or locatee, and zoned for the proposed use, provided that the annual lump sum payments are made in advance with five-year rental reviews.
- b) **Prepayment:** If prepayment of five years is made, the discount rate for the prepayment should be based upon the average yield of long-term Canadian Government securities. If the entire term is prepaid, then the rental amount should reflect the current market value of the rent based on an independent appraisal provided by the proposed lessee, plus a bonus for the privilege of prepaying.

### 3.6 Rent Review:

- a) A five year review interval is appropriate for long-term leases;
- b) The rent is to be fixed by the Minister in accordance with yield guidelines for "vacant lands", being the market value of land less the value of the structures erected thereon by the lessee. If the rent at review is to be based upon unimproved lands, a photograph must be taken of the unimproved site, dated and filed for use by future appraisers. It should be remembered that, under the sample lease or the departmentally approved equivalent, the lessee generally has a right of appeal to the Federal Court if the lessee disagrees with the new rent.

### 3.7 **Special Terms and Conditions**

3.7.1 **Use Clause:** The use should be clearly defined. For example, "seasonal recreational cottage use and not for year round use."

3.7.2 **Renewals:** A right to renew the lease should be avoided wherever possible.

3.7.3 **Insurance:** The lessee should maintain suitable fire insurance for full replacement value and a minimum of \$1,000,000 public liability insurance.

3.7.4 **Improvements:** Commonly, the lessee is required to remove improvements within a specific period after expiration or termination of the lease. If the lessee fails to remove them, they may become the property of the Crown or the Crown may charge the lessee for their removal. Refer to departmentally approved lease standards for sample clauses.

### 3.8 **Other Considerations:**

**Development:** The starting date for construction should be established locally, within the first year of the lease and the development shall be completed within the first three years of the lease. The lessee may be called upon to submit plans for approval by the Band Council. The Lands Officer may consult with Public Works and Government Services Canada, if required.



**Chapter 7**

**Directive 7-4:  
General Guidelines for  
Drafting Leases**

**Annex D:**

**Guidelines for  
Agricultural Leases**

## Annex D

# Guidelines for Agricultural Leases

### 1. Term

1.1 **Length:** The following considerations will help determine the best length for the term of an agricultural lease:

- a) whether the lands are in close proximity to urban areas;
- b) if the lease is for **ordinary agricultural grazing or a cash crop**, the recommended term is five years or less;
- c) if the **lease involves major agricultural development**, such as a dairy, where security of tenure is required, longer periods, to a maximum term of 25 years, may be considered. Longer terms may be appropriate where undeveloped land is involved, and clearing or extensive irrigation may be required.

### 2. Rent

2.1 **Timing of Payments:**

- a) **Grazing Leases** - Rent should be paid annually in advance (e.g. on April 1, 1996 for the period covering April 1, 1996 through March 31, 1997).
- b) **Crop Sharing** - Crop sharing can provide a desirable alternative, and can provide healthy returns to the First Nation, and are currently exempt from GST. Ensuring that the lessee is maximizing crop returns is important, although difficult. The lessee must give a statutory declaration as to the crop share. There are several methods to verify a crop share, such as checking the permit book, grain elevator receipts, or crop insurance.

- 2.2 **Rental Yield:** Rent should be based upon the capacity of the land, whether on a per acre yield per crop, or per animal per month of grazing basis. Where special crops are to be grown, such as vegetables or produce, and the market return is not readily assessable, a market rent of a percentage of the market value of the land may be appropriate.
- 2.3 **Rent review:** If the term is longer than five years, the lease must provide for a rent review set at five years.

### 3. Special Terms and Conditions

- 3.1 **Use Clause:** The use should be specific, and should specify the crops to be used or the animals to be grazed, and the time periods involved. Grazing leases should be seasonal, although tenure should be year round, to allow the lessee to carry out support work when the pastures are unused.
- 3.2 **Renewals:** There should be no right of renewal specified in the lease.
- 3.3 **Insurance:** Liability and Fire insurance as required. Generally, liability insurance should be for a minimum of \$1,000,000.
- 3.4 **Other Considerations:**
- a) **Inspections:** Grazing leases should provide for range inspection after a herd has been removed in the Fall or before turnout in the Spring;
  - b) **Agricultural Practices:** Agricultural practices specified by the Minister, shall be followed in order to protect the land resource;
  - c) **Improvements:** Fixed improvements, such as buried irrigation lines, hay sheds and fences, are to remain with the land.

## Directive 7-5

# Assignments, Sub-leases and Mortgages

### 1. Purpose

- 1.1 This directive provides information on headleases, sub-leases, mortgages and assignments of leasehold interests. Read this directive for guidance on:
- a) **Policy:** The special considerations which apply to assigning, subleasing and mortgaging leasehold interests; and
  - b) **Process:** The steps required to ensure that the proper procedures for carrying out these transactions are followed.

### 2. General

- 2.1 **Before Reading This Directive:** Review Directive 7-1: Leasing Reserve Land - An Overview, which will serve as a roadmap for navigating within Chapter 7. Directive 7-1 discusses the legal framework underlying leases, and offers an overview of the leasing mechanisms under the *Indian Act*. It also contains helpful definitions of terminology that will be found throughout this chapter. Refer also to Chapter 8 - Administering Leases and Permits.
- 2.2 **Transferring Interests in Leases:** Assignments, mortgages and sub-leases involve the transfer of all or part of a lessee's interest in a lease. The basic elements of each of these transfers are as follows:
- a) **Assignment:** An assignment entails the full transfer of a lessee's interest in a lease to a third party, known as the assignee. The assignee in effect "steps into the shoes" of the lessee, and agrees to perform the lessee's responsibilities under the lease. The assignee pays rent directly to the Receiver General for Canada. However, **despite a commonly held belief of many individuals, an assignment generally does not relieve the original lessee from his or her obligations under a lease.** Refer to 3.5.2 and 3.5.3, below, for more guidance on this point;

## Transferring Interests in Leases (continued)

- b) **Sub-lease:** A sub-lease is created when the lessee, after entering a lease with the Minister, known as a headlease, in turn leases his or her leasehold interest to a third party, known as the sub-lessee. Rather than stepping into the lessee's position, the sub-lessee becomes, in essence, the lessee's tenant, and makes rental payments to the lessee. The lessee continues to perform the obligations imposed by the headlease;
- c) **Mortgage:** A mortgage involves pledging the lessee's interest in the land as security for the repayment of a loan made to the lessee by the mortgagee. Should the lessee fail to repay the loan as required, the mortgagee is generally entitled to sell or assume the lessee's interest to satisfy the debt. Because a mortgagee's security is tied to the value of the leasehold interest, a mortgagee is acknowledged to have a special role in the cancellation and amendment of a lease. It should be noted that if the designation stipulates a specific lessee, that lessee may have difficulty in obtaining a mortgage as the mortgagee may not then have the ability to assume the lessee's interests in the event of a default.

### 3. Policy - General

- 3.1 **Consent of Minister:** It is important that all transfers of leasehold interests be in the best interests of the First Nation or, where relevant, the locatee. Therefore, the lease should provide that **the lessee will not assign, sub-lease or mortgage the lease without the prior written consent of the Minister** or the Minister's delegate. Note that:
  - a) For sub-leases, mortgages, and assignments the lease should provide that the consent of the Minister will not be unreasonably withheld;
  - b) where agreed by the parties, the headlease will provide that the Minister will pre-approve an attached standard sub-lease, and when sub-leases under that headlease conform with the standard, additional consent by the Minister will not be required. This pre-approval will not apply to further sub-leases provided they conform to the pre-approved form. For example, a lessee leasing an office complex would use conforming sub-leases to sublet three different floors to three separate sub-lessees. If one of those sub-lessees subsequently sought to sublet their interest, the preapproval would not apply to this subsequent sub-lease.

- 3.2 **Assignment Fees:** The lessee should only be charged an assignment fee if the lease specifically provides for such a fee. **It is improper for a First Nation or locatee to make their consent to a transfer conditional upon payment by a lessee of any sums to the First Nation or any individual,** unless authorized in the lease agreement.
- 3.3 **Lease Not in Default:** To approve for a transfer, the lease must be in good standing, and the lessee cannot be in default under any of its terms or conditions.
- 3.4 **Registration:** Every assignment, sub-lease or mortgage must be registered in the Indian Lands Registry. The assignment, sub-lease or mortgage must be drafted in a form suitable for registration.

#### 4. Policy - Assignments

- 4.1 **Assignee's Obligations:** An assignment cannot be used as a means to change the terms of an existing lease. Therefore, before the Minister consents to an assignment, **the assignee must agree in writing to perform and observe all of the lessee's covenants** and obligations under the lease.
- 4.2 **Lessee's Obligations:** Despite a common misconception to the contrary, although a lessee has, with the Minister's consent, assigned his or her interest in a lease to a third party, **the lessee is still legally bound by his or her commitments under the lease, unless the lessee obtains an express release from the Crown.** If the assignee fails to perform his or her lease obligations, then the lessee will be held responsible for those obligations.
- 4.3 **Releasing the Lessee from their Obligations:** to release the original lessee (assignor) from his or her obligations under the lease, the following steps must be completed:
- a) the original lessee (assignor) must execute a valid assignment agreement (assignor) with the assignee;
  - b) in a separate written agreement, the Crown must release the assignor from his or her obligations under the lease.

**Releasing the Lessee from their Obligations (continued)**

- c) the Crown and the assignee must execute an agreement in which the assignee agrees that the Crown may pursue all remedies under the lease directly against the assignee. Without such an agreement, there is no contractual connection between the Crown and the assignee.

4.4 **First Nation Consent:** As a matter of policy, the department will seek the written consent of the First Nation and/or locatee to the assignment. The Minister may only refuse consent to an assignment without a valid reason if the lease makes provision for such an action. Valid grounds for refusing the assignment should be submitted to the Minister or the Minister's delegate for consideration. The First Nation or locatee should be asked to provide their concurrence or concerns within a reasonable period.

## 5. Policy - Sub-leases

5.1 **Origin of Sub-leases:** The headlease is the lease between the Crown and the lessee, and it creates the leasehold interest that a lessee can then sublet. The sub-lease must therefore always be subordinate to the headlease. The headlease will contain specific requirements governing the sub-lease, and set out contingencies if the headlease is cancelled.

5.2 **Sub-lease Terms:** Several special terms should appear in every sub-lease, and the headlease binds the lessee to include them when negotiating with sub-lessees. These terms include:

- a) **Term of Sub-lease:** While a sub-lease can be for any shorter period, its term must expire at least one day before the headlease ends;
- b) **Land to be leased:** A sub-lease may be for the entire area covered by the headlease, but it usually covers only part of that land. If this is the case, a proper legal description of the sub-lease area is required, ie. a Registration Plan or CLSR survey (see Schedule A of the *Framework Agreement between Lands and Trust Services Department of Indian Affairs and Northern Development and Legal Surveys Division, Earth Sciences Sector Natural Resources Canada* amended from time to time). The sub-lease must convey something less than the headlease conveys: either a shorter term, a smaller portion of land, or both;

**Sub-lease Terms (continued)**

- c) **Dependency on Headlease:** The sub-lease must clearly state that it is subordinate to the headlease, and that the sub-lease will automatically terminate if the headlease is cancelled or otherwise terminated;
- d) **Headlease Terms are Binding:** It is departmental policy to require that the sub-lease will bind the sub-lessee to all the terms of the headlease.

**6. Policy - Mortgages**

6.1 **Terms of the Minister's Consent:** Although the Minister will not arbitrarily withhold his or her consent to the mortgage of a leasehold interest, a mortgagee must meet several conditions to obtain that consent:

- a) **Performance of Lessee's Obligations:** If the mortgagee takes possession of the premises or acquires the lessee's interest, the mortgagee must agree to perform all covenants and obligations under the lease;
- b) **No Assignment or Sale:** The mortgagee cannot assign or sell a lease, as a mortgage remedy, without the consent of the Minister. If the Minister gives consent, the assignee must also agree to perform the lessee's obligations under the lease;
- c) **Insurance Proceeds:** The mortgage must provide that the proceeds of all insurance policies on the leased premises will be used solely for rebuilding or repairing the premises.



- 6.2 Once the lessee has mortgaged a leasehold interest, the mortgagee should be advised of any intention to assign the lease or substantially amend the lease's land description, rent or use. Before completing the assignment or amendment, the Lands Officer should obtain either the written consent of the mortgagee, or a valid discharge of the mortgage.
- 6.3 **Cancellation of a Mortgaged Lease:** If the lessee has mortgaged his or her interest in a lease, the standard lease generally requires the department to fulfill certain obligations to the mortgagee before cancellation of the lease can take place:
- a) **Notice to Mortgagee:** The region must notify the mortgagee before the proposed cancellation, and give the mortgagee the opportunity to assume or sell the leasehold interest, subject to the Minister's consent, or cure the lessee's default;
  - b) **Curing of Default by Mortgagee:** When a mortgagee, after receiving notice of a default by the lessee, cures the default within the required time frame, that curing will be interpreted as a curing of the default by the lessee. In that case, the cancellation of the lease will not continue, and the lease will be again in good standing.

**Note:**

The Mortgagee may have little recourse or remedy in the event of default if the designation named a specific lessee.

## 7. Process

- 7.1 This section summarizes the process for overseeing the assignment, sub-lease or mortgage of a lease of reserve land. Comprehensive checklists for assignments, sub-leases and mortgages are included at the end of this directive (Annexes A, B and C). The following paragraphs outline the major steps to follow when transferring leasehold interests.
- 7.2 **Confirm the Lease is in Good Standing:** The Lands Officer should confirm that the lease in question is in good standing, that no covenants or obligations are in default, and that if the lease is made pursuant to a designation, the designation has not expired.

- 7.3 **Ensure the completion of an Environmental Assessment of the Sub-lease when required:** Under the *Canadian Environmental Assessment Act (CEAA)*, environmental assessments are carried out as early as practicable in the planning stages of a project. DIAND must ensure that the proposed project is subjected to an environmental assessment, which the proposed sub-lessee funds. See Chapter 12 of this manual for further information.
- 7.4 **Conduct a Credit Check of Assignee:** For assignments, a credit check should be conducted on assignees of the lease.
- 7.5 **Check Lease or Designation:** Review the provisions of the lease and the terms of the designation for any special conditions relating to assignments, mortgages or sub-leases.
- 7.6 **Confirm the Legal Description:** a proper legal description of the sub-lease area is required, ie. a Registration Plan or CLSR survey. (see Schedule A of the *Framework Agreement between Lands and Trust Services Department of Indian Affairs and Northern Development and Legal Surveys Division, Earth Sciences Sector Natural Resources Canada* as amended from time to time).
- 7.7 **Request First Nation and Locatee Concurrence:** The region should request the written concurrence of the First Nation, and the locatee, if applicable, to the transaction. Where the First Nation or locatee does not provide their consent within a reasonable time, a letter signed by the Manager, Lands should be sent to the Band Council and locatee. The letter should say that the lease terms do not allow the Minister to arbitrarily refuse to approve a sub-lease or mortgage, and that if no response is received, the First Nation, or the locatee where applicable, will be deemed to have consented to the transaction.
- 7.8 **Obtain Minister's Consent:** After confirming that the required conditions have been met, the region should obtain the consent of the Minister, or his or her delegate to the assignment, sub-lease or mortgage of the lease.
- 7.9 **Register the Transfer:** The assignment, sub-lease or mortgage should be sent to the Indian Lands Registry for registration, following the requirements of the *Indian Lands Registration Manual*, and, where applicable, s. 55 of the *Indian Act*.

- 7.10 **Notify Mortgagee as Required:** If the lessee assigns, sublets or mortgages the lease, or if the lessee defaults, the mortgagee must be notified. The terms of the head lease and consent to the mortgage by the Minister will establish whether or not written consent of the mortgagee is required for the sublease or assignment. For a default, the lessor should give the mortgagee an opportunity to remedy the situation.

## 8. References

- 8.1 For more information, refer to:
- a) *Indian Lands Registration Manual*
  - b) See Chapter 12 of this manual for provisions concerning environmental considerations.

**Chapter 7**

**Directive 7-5:  
Assignments, Sub-leases and Mortgages**

**Annex A:**

**Assignment Checklist**

## Annex A Assignment Checklist

The Lands Officer or, for 53/60 First Nations, the First Nation Land Manager, should take the following steps:

1	Confirm that the lease allows the lessee to assign his or her leasehold interest.	
2	Review the terms of the designation to confirm that an assignment is not prohibited.	
3	Confirm that the lease is in good standing, and that the lessee is not in default with respect to: <ul style="list-style-type: none"> <li>(a) payment of rent; or</li> <li>(b) the performance of any covenants.</li> </ul>	
4	Verify the legal competence of the assignee.	
5	Conduct a credit check on the assignee.	
6	Collect an assignment fee if the lease provides for such a fee.	
7	Obtain the Minister's written consent to the assignment.	
8	Obtain the concurrence of: <ul style="list-style-type: none"> <li>(a) the First Nation; and,</li> <li>(b) the locatee, where applicable.</li> </ul>	
9	If the lease is mortgaged, notify the mortgagee of the assignment and request the mortgagee's written consent.	

10	<p>Determine whether the lessee is to be released from his or her obligations under the lease. If yes:</p> <ul style="list-style-type: none"><li data-bbox="370 394 1281 464">(a) confirm that the original lessee (assignor) and the assignee have executed a valid assignment agreement;</li><li data-bbox="370 506 1281 646">(b) arrange for the execution of an agreement between the Crown and the assignee, in which the assignee agrees that the Crown may pursue all remedies under the lease directly against the assignee;</li><li data-bbox="370 688 1281 793">(c) arrange for the Crown's execution of a release document, which releases the assignor (original lessee) from all obligations under the lease.</li></ul>	
11	Register the assignment in the Indian Lands Registry.	

**Chapter 7**

**Directive 7-5:  
Assignments, Sub-leases and Mortgages**

**Annex B:**

**Sub-lease Checklist**





## Annex B Sub-lease Checklist

The Lands Officer or, for s. 53/60 First Nations, the First Nation Land Manager, should take the following steps:

1	Review the terms of the headlease and confirm that a sub-lease is authorized.	
2	Review the terms of the designation to confirm that a sub-lease is not prohibited.	
3	Confirm that the headlease is in good standing, and that the lessee is not in default with respect to:  <div style="margin-left: 40px;">(a) payment of rent;</div> <div style="margin-left: 40px;">(b) the performance of any covenants.</div>	
4	Confirm that the sub-lease document is a departmentally approved equivalent. Note that it must conform to any pre-approved sub-lease which is appended to the headlease.	
5	Obtain the concurrence of:  <div style="margin-left: 40px;">(a) the First Nation; and,</div> <div style="margin-left: 40px;">(b) the locatee, where applicable.</div>	
6	Have the sub-lessee and lessee execute the sub-lease.	
7	Obtain the Minister's written consent (approved by the departmental officials authorized by the <i>Delegation of Authority Instrument</i> under the <i>Indian Act</i> and related Regulations - refer to the relevant regional delegation instrument) to the sub-lease.	
8	Register the sub-lease in the Indian Lands Registry.	

**Chapter 7**

**Directive 7-5:  
Assignments, Sub-leases and Mortgages**

**Annex C:  
Mortgage Checklist**

## Annex C

### Mortgage Checklist

The Lands Officer or, for s. 53/60 First Nations, the First Nation land manager, should take the following steps:

1	Confirm that the lease permits lessee to mortgage his or her leasehold interest.	
2	Review terms of designation to confirm that mortgage is not prohibited.	
3	Confirm that the lease is in good standing, and that the lessee is not in default with: <ul style="list-style-type: none"> <li>(a) payment of rent;</li> <li>(b) the performance of any covenants.</li> </ul>	
4	Obtain written agreement from the mortgagee: <ul style="list-style-type: none"> <li>(a) to perform and observe all of the lessee's covenants and obligations under the lease if the the mortgagee takes possession of the premises or acquires the lessee's interest.</li> <li>(b) not to assign or sell the mortgage without consent of the Minister.</li> </ul>	
5	Confirm that the mortgage provides that insurance proceeds will be used solely for rebuilding or repairing the leased premises.	

6	Obtain the concurrence of:  (a) the First Nation; and,  (b) the locatee, where applicable.	
7	Obtain the Minister's written consent (approved by the departmental officials authorized by the <i>Delegation of Authority Instrument</i> under the <i>Indian Act</i> and related Regulations - refer to the relevant regional delegation instrument) to the mortgage.	
8	Register the mortgage in the Indian Lands Registry.	
9	If the lease is to be cancelled, notify the mortgagee in writing and give the mortgagee an opportunity to remedy the situation.	

# Directive 7-6

## Cancelling Leases

### 1. Purpose

- 1.1 This directive explains how to cancel leases of reserve land. This directive gives information and guidance about:
- a) **Policy:** The circumstances which trigger review of an existing lease, and the guidelines for cancellation; and
  - b) **Process:** The steps and procedures involved in cancelling a lease.

### 2. General

- 2.1 **Before Reading This Directive:** Review Directive 7-1: Leasing Reserve Land - An Overview, which will serve as a roadmap for navigating within Chapter 7. Directive 7-1 discusses the legal framework underlying leases, and offers an overview of the leasing mechanisms under the *Indian Act*. It also contains helpful definitions of terminology that will be found throughout this chapter. Refer also to Chapter 8 - Administering Leases and Permits.
- 2.2 **Cancellation:** "Cancellation" refers to the process for ending a lease before the conclusion of its stated term, because the lessee fails to comply with their obligations under the lease. In this directive, the terms "cancellation" and "termination" are used interchangeably.
- 2.3 **Authority for Cancellation:** The *Indian Act* contains no specific provision to cancel leases. The framework for cancelling leases is included as part of the mandatory terms and conditions contained in every standard lease agreement or the departmentally approved equivalent.
- 2.4 The cancellation of a lease will be directed for the Minister by the appropriate regional office of the department (approved by the departmental officials authorized by the *Delegation of Authority Instrument* under the *Indian Act* and related Regulations - refer to the relevant regional delegation instrument).

- 2.5 **Consultation with Justice:** Cancelling a lease is a significant step, with important legal consequences. The cancellation must be managed very carefully, and, where there is any uncertainty, the regional office of the Department of Justice should be consulted on every step to be taken.
- 2.6 **When Cancellation May be Triggered:** Several circumstances will trigger the right of the Minister to cancel a lease of reserve land:
- a) **Failure to pay rent or other sums due under the lease:** The lease requires the lessee to pay rent in a timely manner. If the lessee fails to do so, the Minister may, after following the proper procedures, terminate the lease;
  - b) **Failure to perform or observe any covenants set out in the lease:** Every lease sets out a variety of covenants, or obligations, which the lessee agrees to perform. Failure by the lessee to perform any of these covenants *can*, in the appropriate circumstances, be grounds for cancelling the lease, although cancellation is not automatic. The standard form lease, for example, gives the lessee a specified time to correct any defaults in performance;
  - c) **Change in Corporate Control of the Lessee:** When a lessee is a corporation, and, without the department's consent, it changes their control or ownership through the sale or disposition of its shares, the Minister may terminate the lease. This trigger generally applies only to a lessee in a commercial lease.

Refer also to Chapter 8 - Administering Leases and Permits.

- 2.7 **Alternatives to Cancellation:** Cancellation is not automatically the appropriate response to a lessee's failure to perform their obligations under a lease. The region and the First Nation should determine the appropriate course of action, and alternative remedies should always be considered. For example, depending on the circumstances, the department may elect to re-let the land as agent for the lessee, or to perform covenants for, and at the expense of, the lessee.

### 3. Policy

- 3.1 **Independent Confirmation:** Before commencing cancellation proceedings, the region must **independently verify** the circumstances surrounding the lessee's failure to perform their obligations. The region cannot simply rely on information provided by the First Nation. Verification can take many forms, and discretion should be used. At the least, a letter should be sent to the lessee outlining the alleged circumstances and requesting confirmation that a default has in fact occurred. Where default of payment is involved, confirmation may be sought from the Receiver-General, or the appropriate bank, with the First Nation's consent, if required.
- 3.2 **Consultation with First Nation and Locatee:** If the region finds valid grounds to cancel a lease, it should discuss this with the First Nation to learn their views, objectives and best interests. For a locatee lease, the region should obtain the views of the locatee. These views should be confirmed in writing.
- 3.3 **Consultation with Justice:** In determining what course of action is in the best interest of the First Nation, the region must consult with the Department of Justice.
- 3.4 **Notice of Default:** If, after discussions with the First Nation and consultation with the Department of Justice, the decision is made to cancel a lease, the region should deliver to the lessee notice of the default. The notice should require the lessee to correct the default within the time frame set out in the lease. If the lease does not contain such a time frame, the notice must allow the lessee a **reasonable time to cure the default**.

**Note:**

Pursuant to the notice provisions of standard lease documents, the Notice of Default must be signed by the departmental official who is authorized by the *Delegation of Authority Instrument* under the *Indian Act* and related Regulations (refer to the relevant regional delegation instrument) to sign on behalf of the Minister. Therefore, a Notice of Default may not be valid if signed by a Lands Officer.

- 3.5 **Reasonable Time to Cure the Default:** The lease will generally specify how much time a lessee will be given to cure a default. Where the lease does not specify, the question of what is a reasonable time will depend on the specific circumstances. The following sets out some guidelines which should be followed where the lease has not provided specific time periods:
- a) **Failure to Pay Rent:** If the lessee has failed to pay rent as and when required by the lease, then **30 days should be considered a reasonable time** to remedy the problem;
  - b) **Other Types of Defaults:** If the default is one that the lessee can remedy easily, then 30 days may be considered a reasonable time to remedy the problem. If the nature of the default is such that the lessee cannot cure it within 30 days, the lessee should be required to begin curing the default when the lessee receives the notice, and to complete it as quickly as possible with all due diligence. Any disagreement about whether the lessee has acted promptly and with due diligence may generally be referred to the Federal Court.
- 3.6 **Notice of Cancellation:** If the lessee's default has not been corrected within the time limit required by the department, or by the terms of the lease, the region must deliver a notice of cancellation to the lessee. The notice should be drafted in close consultation with the Department of Justice. The notice must:
- a) include the particulars of the lease being cancelled;
  - b) provide the reason for the cancellation and set out the covenants breached;
  - c) advise the lessee that all rent due is still payable, and that the lessee is obligated to pay all outstanding amounts;
  - d) advise the lessee that the cancellation does not prejudice Her Majesty's rights under the lease; and
  - e) be executed by the departmental official who is authorized by the *Delegation of Authority Instrument* under the *Indian Act* and related Regulations to sign on behalf of the Minister.



- 3.7 **Change in Control of Lessee:** When the default concerns a change in the control of a corporate lessee, the regional departmental representatives must **act promptly** to cancel the lease, **if termination is considered the appropriate course** of action. The standard commercial lease provides that the Minister must give notice of termination within 60 days of becoming aware of the change. The termination is effective a further 60 days following that notice of termination.
- 3.8 **Mortgagee's Rights:** If the lessee has mortgaged his or her interest in a lease, the department has certain obligations to the holder of the mortgage (the "mortgagee") which it must fulfill before cancellation of the lease can take place:
- a) **Notice to Mortgagee:** The region must notify the mortgagee before the proposed cancellation, and give the mortgagee the opportunity to assume or sell the leasehold interest, subject to the Minister's consent, or to cure the lessee's default;
  - b) **Curing of Default by Mortgagee:** When a mortgagee, after receiving notice of the lessee's default, cures the default within the required time frame, that curing will be interpreted as a curing of the default by the lessee. Then, the cancellation of the lease will not continue, and the lease will again be in good standing.
- 3.9 **First Nation Not to Commence Proceedings: All lease cancellations must be initiated and conducted by DIAND.** Where a First Nation has delegated authority under s. 53 or s. 60, actions to recover overdue rent **may not be started without prior consultation** with the department. A First Nation may send a letter advising the lessee that the rent is in arrears, and requesting payment of overdue amounts. However, the department must send the Notice of Cancellation to initiate the cancellation proceedings.
- 3.10 **Relinquishment of Interests:** If a lessee wishes to give up an interest or right it has obtained under a lease, the Minister must consent to that relinquishment for it to be effective and binding on Her Majesty, unless the lease provides that a lessee can unilaterally relinquish an interest. Before consenting to a relinquishment, the Minister will normally seek the consent of the First Nation, and where applicable, the locatee.

- 3.11 **Improvements:** The lease will state whether improvements become the property of Her Majesty or the lessee upon expiration or termination of the lease. As a rule, improvements made under a lease, such as buildings, should revert to the Crown. This is one benefit to the lessor for leasing, and is usually provided for by the lessee's accounting method. If the lessee is to remove improvements at the expiration or cancellation of the lease, the lease should clearly state that the lessee must remove the improvements by a certain time, failing which they will revert to the Crown, and the Crown may remove them at the lessee's expense.

#### 4. Process

- 4.1 This section summarizes the process for cancelling a lease of reserve land. A checklist is included at the end of this directive as Annex A. The following paragraphs outline the major steps to follow when leases are cancelled. Unless otherwise indicated, the regional office of DIAND conducts all actions.
- 4.2 **Verify the Facts:** Independently verify the lessee's default.
- 4.3 **Trigger for Cancellation:** Review the lease and confirm that the default is a trigger for cancellation of the lease, such as a failure to pay rent, or a breach of a covenant.
- 4.4 **Discuss with First Nation or Locatee:** Consult with the First Nation or locatee concerning their views, wishes and best interests about the cancellation of the lease. Request confirmation of those views in writing.
- 4.5 **Consult with Justice:** Consult with the Department of Justice concerning the circumstances of the default, and the best interests of the First Nation.
- 4.6 **Search for Mortgagees:** A search of the Reserve Lands Register or, where the land is designated land, the Surrendered and Designated Lands Register should be conducted to confirm whether the lessee has mortgaged his or her leasehold interest in the land.

- 4.7 **Execution of the Notice:** The notice of default must be executed by the departmental official who is authorized by the *Delegation of Authority Instrument* under the *Indian Act* and related Regulations to sign on behalf of the Minister.
- 4.8 **Send the Lessee Notice:** Send the notice of the default to the lessee. The letter must set out the specific elements of the default, and give the lessee a deadline within which to remedy the situation. The letter should be sent by registered mail.
- 4.9 **Give the Mortgagee Notice:** If the lessee has mortgaged the leasehold, send a copy of the notice of default to the mortgagee by registered mail. Advise the mortgagee that it may remedy the lessee's breach prior to cancellation of the lease, or may assume or sell the leasehold interest, subject to the Minister's consent. This is a right given to the mortgagee by law, not only by policy, and should be strictly complied with.
- 4.10 **Verify whether the lessee cured the default by the given deadline,** or whether the mortgagee cured the default or assumed or sold the leasehold interest with the Minister's consent.
- 4.11 **Send Cancellation Notice:** If the lessee or, where applicable, the mortgagee has not cured the default, a notice of cancellation should be drafted in consultation with the Department of Justice. The notice should be sent to the lessee and any mortgagee by registered mail.
- 4.12 **Execution of a Cancellation Notice:** The notice of Cancellation must be executed by the departmental official who is authorized by the *Delegation of Authority Instrument* under the *Indian Act* and related Regulations to sign on behalf of the Minister.
- 4.13 **Follow Up:** As an example, ensure that the lessee has vacated the land following cancellation. Or, if the lease is a headlease, ensure that the sub-lessee does not continue to make payments to the head lessee. If rent is in default, take steps to collect the unpaid rent for the Crown. Issues such as eviction proceedings, responsibility for abandoned chattels, procedures for changing locks and related legal issues should be referred to the Department of Justice for guidance.

- 4.14 **Register Notice of Cancellation:** Register a notice of cancellation of the lease in the Indian Lands Registry in which the lease was originally registered.

## 5. References

- 5.1 For more information, refer to the *Indian Lands Registration Manual*.

**Chapter 7**  
**Directive 7-6:**  
**Cancelling Leases**

**Annex A:**  
**Lease Cancellation Checklist**

## Annex A Lease Cancellation Checklist

The Lands Officer or appropriate departmental official should take the following steps:

1	<p>Verify a default by the lessee, independently of any allegations by the First Nation, by:</p> <ul style="list-style-type: none"> <li>(a) confirming in writing the facts with the lessee;</li> <li>(b) confirming a rent payment default with the Receiver General; and</li> <li>(c) obtaining other third-party confirmation.</li> </ul>	
2	<p>Review the terms of the lease to confirm that a default is a trigger for cancellation, such as:</p> <ul style="list-style-type: none"> <li>(a) a failure to pay rent or other sums due under the lease;</li> <li>(b) a failure to perform or observe any covenants set out in the lease;</li> <li>(c) a change of control of the corporate lessee.</li> </ul>	
3	<p>Discuss with the First Nation, and where applicable the locatee, about their best interest and wishes with respect to the default.</p>	
4	<p>Consult the Department of Justice about the circumstances of the default, and the best interests of the First Nation.</p>	
5	<p>Conduct a search of the Indian Land Registry.</p>	
6	<p>Determine whether cancellation is the preferred option.</p>	

7	<p><b>If cancellation is not appropriate:</b> Consider other options, including:</p> <ul style="list-style-type: none"> <li>(a) re-letting of lands as agent for the lessee;</li> <li>(b) performing the lessee's covenants under the lease for and at the expense of the lessee.</li> </ul>	
8	<p><b>If cancellation is appropriate:</b> Draft a notice of default by:</p> <ul style="list-style-type: none"> <li>(a) setting out the specific elements of the default;</li> <li>(b) giving the lessee a deadline within which to remedy the default.</li> </ul>	
9	Deliver the notice of default to the lessee by registered mail.	
10	Where the lessee has mortgaged the lease, deliver a copy of the notice of default to the mortgagee by registered mail, and advise the mortgagee that they may remedy the breach for the lessee prior to cancellation of the lease.	
11	Verify whether the lessee or the mortgagee has remedied the default by the deadline, or whether the mortgagee has assigned or sold the leasehold interest with the Minister's consent.	
12	<p>If the lessee or the mortgagee has not remedied the default:</p> <ul style="list-style-type: none"> <li>(a) draft a notice of cancellation in close consultation with the Department of Justice;</li> <li>(b) send the notice of cancellation to the lessee by registered mail;</li> <li>(c) where the lease is mortgaged, send the notice of cancellation to the mortgagee by double registered mail.</li> </ul>	

13	Determine follow-up steps to be taken, including: <ul style="list-style-type: none"><li data-bbox="444 281 964 317">(a) eviction procedures, if required;</li><li data-bbox="444 354 794 390">(b) removal of chattels;</li><li data-bbox="444 428 862 464">(c) collection of unpaid rent;</li><li data-bbox="444 501 1114 537">(d) collection of any sub-lease payments; and</li><li data-bbox="444 575 773 611">(e) changing of locks.</li></ul>	
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## Directive 8-1

# Policy and Management Framework

### 1. Purpose

- 1.1 **This is an information directive** that describes the policy and management framework for the administration of land and resource instruments under the *Indian Act*. You should read it for information on basic concepts, policy objectives, principles and requirements.

### 2. General

- 2.1 **What are land and resource instruments?** They are documents such as permits, leases, MOUs and rights of way agreements, used to grant or record interests in reserve or designated lands. They are issued under the *Indian Act*. Such interests are held by First Nation communities, individuals, or third parties.
- 2.2 **What is excluded?** Leases and permits issued under the *Indian Oil and Gas Act* do grant interests in reserve or designated lands, but are not administered under the *Indian Act*. Hence, leases and permits under the *Indian Oil and Gas Act* are excluded from the scope of this manual.

**EXAMPLE 1: LAND AND RESOURCE INSTRUMENTS**

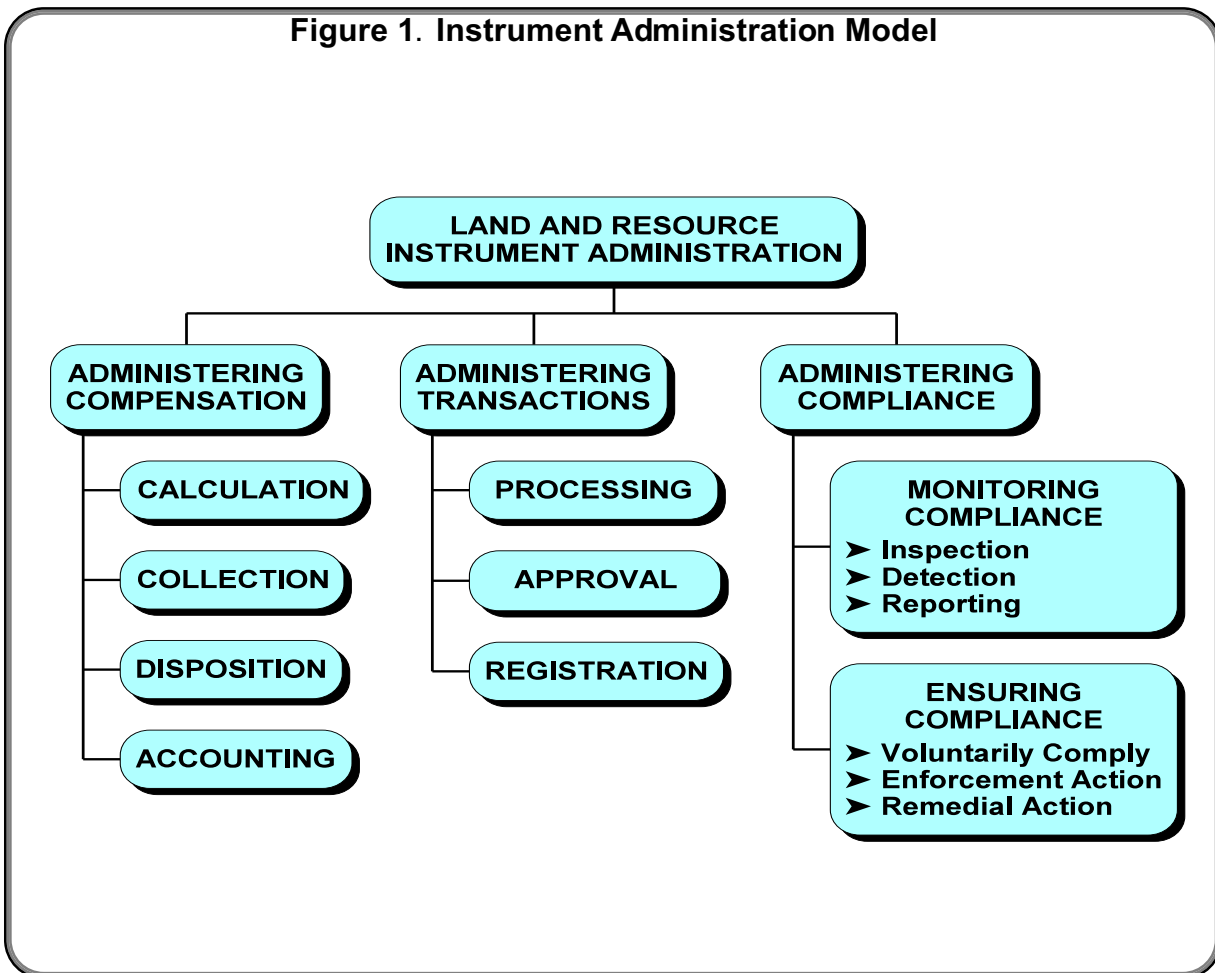
**What is an 'instrument'?** Land and resource instruments are documents which record an interest in reserve or designated lands or the resources on or under them. They are described in Chapter 2 of this manual. Only five types are usually administered:

01. **Leases:** These grant an exclusive right of use and occupation to a parcel of land for a specified period of time. Grantees may transfer, assign, mortgage or sub-lease all or part of their leasehold with the Crown's permission and the consent of the First Nation and/or the locatee where applicable.
02. **Resource Permits:** These include agricultural, timber, sand and gravel and mining permits. They grant access to a parcel to remove or use resources and specify compensation and conditions. Depending on the terms of the permit, they may be transferred, assigned or mortgaged.
03. **Waste Disposal Permits:** These authorize the operation of waste disposal sites on a parcel under the *Indian Waste Disposal Regulations* under specific conditions. They may not be transferred, assigned or mortgaged.
04. **Other Permits:** Examples include utility or navigation site permits. They grant limited, non-exclusive rights of use or occupation for a specific period to a site, parcel or area and the rights may be transferable.
05. **Allotments:** These grant eligible First Nation individuals the exclusive right to lawful possession of a specified parcel. They can be transferred, leased and inherited. Under certain circumstances, they can also be mortgaged to a First Nation or First Nation member. Allotments are administered under Chapter 3 of this manual.

2.3 What is land and resource instrument administration? It is part of land and resource management. As shown in Figure 1, instrument administration involves three basic functions:

- a) **Administering Transactions:** This is the process of reviewing, approving and registration of transactions related to an instrument. Examples of transactions include transfers, mortgages, assignments and sub-leases.

- b) **Administering Compensation:** This means calculating, collecting, disposing of and accounting for the compensation owed under an instrument. Compensation includes rents, fees and other benefits such as revenue or crop shares, jobs and contracts.
- c) **Administering Compliance:** This comprises monitoring and enforcement of the terms of the instrument. Monitoring involves inspection, detection and reporting. Enforcement involves voluntary compliance, enforcement action and remedial action.



- 2.4 **Priorities:** Tasks related to the three functions described in Paragraph 2.3 are rated according to task priority. Ranked from highest to lowest are:
- a) **Essential Tasks:** These must be performed in all cases. This will include any task relating to the department's contractual obligations under the instrument. Examples may be the collection of compensation, inspections and enforcement actions with a direct and material impact on health or safety.
  - b) **Priority Tasks:** These are tasks which materially affect First Nation and Crown interests. They should be given priority when planning and managing these functions and allocating resources. They include the disposition of compensation, First Nation initiated transactions and monitoring and enforcement actions related to preserving, protecting and conserving the environment, lands and resources.
  - c) **Routine Tasks:** These should be performed, to the maximum extent possible, within existing resources and operating conditions. They will generally include accounting for compensation, routine transactions and monitoring and enforcement actions which are less likely to materially impact on First Nation or Crown interests. It is therefore important to ensure that when terms are negotiated in an instrument, that any monitoring requirements are manageable using our available resources.
- 2.5 **Our objective is to protect First Nation and Crown interests.** The department believes that land and resource administration should support six key objectives. These reflect our understanding of our responsibilities and the needs and priorities which First Nations have communicated to us. The objectives of our policy and management framework are to:
- a) **Benefit First Nations:** We should ensure that First Nations receive all the benefits to which they are entitled under the terms of an instrument.
  - b) **Fulfilment of legal obligations:** The department must fulfill all statutory duties, fiduciary obligations and contractual commitments related to the administration of these instruments.
  - c) **Preserve lands and resources:** The department should make every effort to preserve, conserve and protect lands, resources and the environment in administering these instruments.
  - d) **Promote health and safety:** We must do our best to protect the health and safety of First Nation communities, individuals and of any third parties affected by these instruments. It is therefore important to carefully consider the benefits of entering into a contract versus rejecting the concept because of the potential risks the venture may pose.

- e) **Protect Crown interests:** We must protect the honour and interests of the Federal Crown.
- f) **Promote sustainable development:** We should foster the development of First Nation community economies on a sustainable, long term basis. Again, consider the long term impacts of the instrument, especially for ventures such as land fill sites which will permanently change the future use of the land.

### 3. Authorities

- 3.1 The instruments administered under this policy are issued under the *Indian Act* and related regulations. They are governed by the following sections of the *Indian Act*.

2.(1) *“Indian moneys” means all moneys collected, received or held by Her Majesty for the use and benefit of Indians or bands;*

53. (1) *The Minister or a person appointed by the Minister for the purpose may, in accordance with this Act and the terms of the absolute surrender or designation as the case may be,*

- (a) *manage or sell absolutely surrendered lands; or*
- (b) *manage, lease or carry out any other transaction affecting designated lands.*

53. (3) *No person who is appointed pursuant to subsection (1) or who is an officer or servant of Her Majesty employed in the Department may, except with the approval of the Governor in Council, acquire directly or indirectly any interest in absolutely surrendered or designated lands.*

54. *Where absolutely surrendered lands are agreed to be sold and letters patent thereto have not been issued, or where designated lands are leased or an interest in them granted, the purchaser, lessee or other person who has an interest in the absolutely surrendered or designated lands may, with the approval of the Minister, assign all or part of that interest to any other person.*

55. (1) *There shall be kept in the Department a register, to be known as the Surrendered and Designated Lands Register, in which shall be entered all the particulars in connection with any transaction affecting absolutely surrendered or designated lands.*

- (2) *A conditional assignment shall not be registered.*
- (3) *Registration of an assignment may be refused until proof of its execution has been furnished.*
- (4) *An assignment registered under this section is valid against an unregistered assignment or an assignment subsequently registered.*

56. *Where an assignment is registered there shall be endorsed on the original copy thereof a certificate of registration signed by the Minister or by an officer of the Department authorized by him to sign such certificates.*
58. (2) *Out of the proceeds derived from the improvement or cultivation of lands pursuant to paragraph (1)(b) a reasonable rent shall be paid to the individual in lawful possession of the lands or any part thereof, and the remainder of the proceeds shall be placed to the credit of the band, but if improvements are made on the lands occupied by an individual, the Minister may deduct the value of such improvements payable to such individual under this subsection.*
- (5) *The proceeds of the transactions referred to in subsection (4) shall be credited to band funds or shall be divided between the band and the individual Indians in lawful possession of the lands in such shares as the Minister may determine.*
59. *The Minister may, with the consent of the council of a band,*
- (a) *reduce or adjust the amount payable to Her Majesty in respect of a transaction affecting absolutely surrendered lands, designated lands or other lands in a reserve or the rate of interest payable thereon;*
62. *All Indian moneys derived from the sale of surrendered lands or the sale of capital assets of a band shall be deemed to be capital monies of the band and all Indian moneys other than capital moneys shall be deemed to be revenue moneys of the band.*
63. *Notwithstanding the Financial Administration Act, where moneys to which an Indian is entitled are paid to a superintendent under any lease or agreement made under this Act, the superintendent may pay the moneys to the Indian.*

## 4. Policy

- 4.1 **All instruments will be administered in accordance with basic principles.** All instruments covered by this policy must be identified and administered. At a minimum, this should include the administration tasks as defined in Paragraph 2.4 of this directive. The performance of these tasks should be guided by the following basic principles and requirements:
- a) **Pursuing objectives and priorities:** To the extent possible, instrument administration should support the achievement of the objectives stated in Paragraph 2.5 and respect the priorities described in Paragraph 2.4.
- b) **Fostering First Nation control:** It should be carried out in a manner which gives First Nations the greatest possible degree of control over reserve lands and resources consistent with the stated policy objectives.

- c) **Building partnerships:** All instrument administration functions should, to the maximum extent possible, be based on a partnership involving the department, First Nations and other stakeholders.
- d) **Effectively using resources:** First Nation and departmental resources should be effectively managed on the basis of cost, benefits and risks related to the objectives and priorities stated in this directive.

4.2 **The department will administer instruments in cooperation with other stakeholders.** The department acknowledges that it has responsibilities in all three areas of instrument administration. At the same time, the department also expects other parties affected by the terms of these instruments to fulfill their responsibilities in these areas. In summary those responsible are listed as follows:

- a) **Grantees:** are expected to comply with their obligations under the instrument. The most important of these are the provisions of compensation, preservation of the condition and value of the land, resources, environment, improvements and adequate provisions for health and safety. Further, the grantee is expected to provide evidence of compliance with these obligations.
- b) **Beneficiaries:** are expected to report any information which may affect their interests and adequately account for any compensation transferred to their control.
- c) **Enforcement Agencies:** are expected to perform their mandated functions on areas covered by land and resource instruments.
- d) **Affected Third Parties:** are expected to advise the department or appropriate enforcement agency of any matter requiring their attention. Third parties include sub-lessees, lenders or developers as well as neighbouring lessees, locatees or municipalities.

4.3 **Regions and First Nations must establish systems.** Regions and those First Nations funded for instrument administration functions must establish systems for the management and operation of these functions. All such systems must, at a minimum, conform to the following requirements:

- a) **Scope:** They must address all essential functions for every instrument.
- b) **Inventory:** They must include the establishment and updating of an inventory of land and resource instruments.



- c) **Management:** They must provide for the planning of activities and allocation of resources based on an assessment of priorities, costs, benefits and risks.
- d) **Partnership Arrangements:** They must include provisions for cooperative arrangements among stakeholder groups for achieving the objectives of this policy.
- e) **Evaluation and Reporting:** They must include provisions for reporting and assessing instrument administration operations and their effectiveness in achieving the objectives of this policy.

## 5. Process

- 5.1 **Processes are described in the remainder of this chapter.** As this is an information directive, it does not cover processes or procedures. These are covered in the remaining directives in this chapter.

## 6. Implementation

- 6.1 **This directive will replace previous directives and will be effective as of the date below.** All regions and First Nations responsible for instrument administration are required to establish inventories and systems in accordance with this directive.
- 6.2 **Responsibility** for the implementation of this directive will be as follows:
- a) **Headquarters Lands Directorate** is responsible for coordinating the development of policies, procedures and training in partnership with First Nations and other stakeholders;
  - b) **Regions** are responsible for communicating this policy, establishing operating systems and preparing reports in accordance with the requirements of this policy;
  - c) **Participating First Nations** are responsible for establishing operating systems and preparing reports in accordance with the requirements of this policy; and,
  - d) **Other First Nations** which are not participating in departmental land management programs are responsible for carrying out their obligations as beneficiaries of land and resource instruments.

## 7. References

- 7.1 You may wish to refer to the following chapters of this manual relating to the instruments administered under this chapter.
- a) Chapter 3 - Individual Interests;
  - b) Chapter 6 - Permits;
  - c) Chapter 7 - Leases; and
  - d) Chapter 12 - Environment
- 7.2 You may also wish to consult departmental manuals relating to the management of resources and the environment. You can get them from the Headquarters **Environment and Natural Resources Directorate** of Indian and Northern Affairs Canada at 819-953-1885.
- They include:
- a) *Indian and Northern Affairs Canada Forestry Manual*
  - b) *Indian and Northern Affairs Canada Minerals Policy and Procedure Manual*
- 7.3 Finally, you may wish to consult the *Estates Procedures Manual* for information relating to some aspects of transaction processing for allotment. You can obtain copies of the manual or more information at 819-994-6700.

## Directive 8-2

# Administering Compensation

### 1. Purpose

- 1.1 This directive states the policies and procedures pertaining to the administration of rents, fees and other benefits from land and resource instruments issued under the *Indian Act*. It provides basic information and explains DIAND's policies and procedures respecting this process.

### 2. General

- 2.1 Compensation is what is given for an interest granted on reserve lands. Instruments, such as leases will specify the compensation for the interest granted, as well as for damage or default of a covenant under the lease. Compensation is for the benefit of the First Nation or nations for whom the reserve was set aside. However, benefits not specified in the instrument are not considered compensation.
- 2.2 Compensation can be paid in cash or as some other form of valuable consideration. Cash payments are funds payable to the Crown in legal tender. These payments include: rents, fees, fines, insurance proceeds and other moneys due under the instrument. 'Other benefits' are anything else provided in return for the interest granted, damages or defaults. The most common examples are employment opportunities, and public works or utilities.

#### EXAMPLE 1. - 'OTHER' COMPENSATION

**So what is 'other' compensation?** Any non-monetary compensation provided by the grantee in return for an interest in reserve land or for damage or default. 'Other compensation' could include:

- |                                       |                                       |
|---------------------------------------|---------------------------------------|
| 1. Jobs                               | 5. Housing                            |
| 2. Infrastructure such as roads       | 6. Utilities such as water and power  |
| 3. Business contracts                 | 7. Payment in kind such as free power |
| 4. Employment training and experience | 8. Stocks, bonds or other securities  |

2.3 In most cases, other compensation is not provided directly to the Crown. Consequently, activities related to this type of compensation generally fall under compliance. That being said, there are four main activities related to the administration of payments which will be made to the Crown. They are as follows:

- a) **Calculating:** This is the process of determining how much is owed. This may simply be a matter of referring to the amount specified in the instrument. However, it may also involve more complex tasks such as conducting rent reviews or calculating the amount owing in a crop share or participation rent arrangement. It is, therefore, important to ensure deadlines are met and reporting requirements are adhered to by the grantee.
- b) **Collecting:** This involves receiving, verifying and recording the payments made, comparing them to the amount owed and noting any differences within the prescribed time periods provided under the instrument.
- c) **Disposing:** This is the task of ensuring that payments received are deposited to the proper accounts, or turned over to the appropriate organization or individual.
- d) **Accounting:** This is the process of maintaining appropriate records, providing reports to all those having an interest in these payments arranging for audits and responding to questions.

2.4 **Payments may be received on behalf of the First Nation or an individual.** A payment may be made in return for an interest on reserve lands held in common or lands allotted to a First Nation member. Such payments may be received by the department or the First Nation. The following are four situations in which payments can be received:

- a) **Payments for the First Nation received by the department.** In this situation, the department receives a payment under an instrument issued on un-allotted band land.
- b) **Payments for the First Nation received by the First Nation.** This is where the First Nation collects or receives the payment, for an instrument on un-allotted band land, on behalf of the Crown with or without delegated authority.
- c) **Payments for an individual received by the department.** In this case, the department receives a payment under an instrument which relates to lands allotted to a member of the First Nation.

- d) **Payments for an individual received by the First Nation.** Here it is the First Nation which receives a payment relating to allotted lands, on behalf of a locatee.
- 2.5 **Payments involve managing both reserves and Indian moneys.** Under the *Indian Act*, the department is responsible for the administration of reserve and designated lands and the management of Indian moneys as defined in section 2(1) of the *Indian Act*. These areas operate under separate delegated authorities, organizational structures and policy regimes. This means that some of the activities covered by this directive may also be related to policies issued by the Indian Moneys Directorate. Consequently, the Lands Officer should consult with a Band Governance Officer or Headquarters governance section when questions arise.
- 2.6 Once you are satisfied that the terms of the contract have been satisfied, the administration of payments ends with the disposition of the payment for that period. However, it is very important to ensure the calculation was correct, collection is complete and disposition of the payments have been properly performed along with any follow up.
- 2.7 **The department cannot administer unauthorized compensation.** Interests that the Crown has not authorized, such as buckshee leases or customary allotments are not instruments under the *Indian Act*. Therefore, the department can neither recognize, nor administer compensation related to these arrangements.
- 2.8 **Our objective is to ensure a First Nation receives the benefits due to them in a prudent and responsible manner.** The department is committed to administering compensation according to the following principles:
- a) **First Nations benefit:** Unless otherwise agreed to by the Crown and the First Nation, all benefits owed under an instrument should be collected and disposed of in a timely and appropriate manner.
- b) **Fairness and Equity:** The rights and interests of all those involved must be respected and, where necessary, fairly balanced.
- c) **Respect for law:** The *Indian Act*, *Financial Administration Act* and certain common law principles impose requirements on payment administration. All activity in this area must conform to these requirements.
- d) **Full accountability:** All benefits owing and collected under an instrument must be properly accounted for.

- e) **First Nation control:** The administration of compensation should enable First Nations to exercise the maximum possible degree of control consistent with these requirements.

### 3. Authorities

- 3.1 The collection and disposition of rents, fees and other monies collected through the administration of land and resource instruments is governed by both the *Indian Act* and the *Financial Administration Act*.
- 3.2 Sections 2(1), 53(1), 58(2), 58(5), 62, 63, and 69 of the *Indian Act* are all relevant to this directive.

2. (1) "Indian moneys" means all moneys collected, received or held by Her Majesty for the use and benefit of Indians or bands;

53. (1) The Minister or a person appointed by the Minister for the purpose may, in accordance with this Act and the terms of the absolute surrender or designation as the case may be,

- (a) manage or sell absolutely surrendered lands; or
- (b) manage, lease or carry out any other transaction affecting designated lands.

58. (2) Out of the proceeds derived from the improvement or cultivation of lands pursuant to paragraph (1)(b) a reasonable rent shall be paid to the individual in lawful possession of the lands or any part thereof, and the remainder of the proceeds shall be placed to the credit of the band, but if improvements are made on the lands occupied by an individual, the Minister may deduct the value of such improvements payable to such individual under this subsection.

- (5) The proceeds of the transactions referred to in subsection (4) shall be credited to band funds or shall be divided between the band and the individual Indians in lawful possession of the lands in such shares as the Minister may determine.

62. All Indian moneys derived from the sale of surrendered lands or the sale of capital assets of a band shall be deemed to be capital monies of the band and all Indian moneys other than capital moneys shall be deemed to be revenue moneys of the band.

63. Notwithstanding the *Financial Administration Act*, where moneys to which an Indian is entitled are paid to a superintendent under any lease or agreement made under this Act, the superintendent may pay the moneys to the Indian.

69. (1) *The Governor in Council may by order permit a band to control, manage and expend in whole or in part its revenue moneys and may amend or revoke any such order.*

69. (2) *The Governor in Council may make regulations to give effect to subsection (1) and may declare therein the extent to which this Act and the Financial Administration Act shall not apply to a band to which an order made under subsection (1) applies.*

### 3.3 **The *Financial Administration Act* governs the disposition of all moneys owed to or collected by the Crown. The *Financial Administration Act* provides that:**

2. (1) *“public money” means all money belonging to Canada received or collected by the Receiver General or any other public officer in his official capacity or any person authorized to receive or collect such money and includes:*

- (a) duties and revenues of Canada,*
- (b) money borrowed by Canada or received through the issue or sale of securities,*
- (c) money received or collected for on behalf of Canada, and*
- (d) all money that is paid to or received or collected by a public officer under or pursuant to any Act, trust, treaty, undertaking or contract and is to be disbursed for a purpose specified in or pursuant to that Act, trust, treaty, undertaking or contract;*

17. (1) *Subject to this Part, all public money shall be deposited the credit of the Receiver General.*

17. (3) *Every person who collects or receives public money shall keep a record of receipts and deposits thereof in such a form and manner as the Treasury Board may prescribe by regulation.*

17. (4) *Subject to any regulations made under subsection (5), every person employed in the collection or management of or charged with the receipt of, public money and every other person who collects or receives public money shall pay that money to the credit of the Receiver General.*

## 4. Policy

### 4.1 **Compensation should maximize returns.** Payment shall always be calculated on a basis which would provide the best overall return to the First Nation.

- 4.2 **Beneficiaries should be consulted.** The beneficiary of an instrument should be consulted whenever a decision regarding compensation arises, such as whether to adjust payments as a result of a rent review. The beneficiary should be provided with all of the information relevant to the decision, and their wishes should be followed to the maximum extent possible under the terms of an instrument. That being said, it is extremely important to ensure that deadlines are met and that waiting for concurrence on a rent review does not put the Crown in a position of being liable for damages.
- 4.3 **Overall return should reflect long term business considerations.** When calculating compensation, it is important to consider all factors which might affect the overall level of compensation over the life of the instrument. Consequently, the First Nation council or individual members must seek independent legal advice or any other expert advice that they may deem necessary to make the best decision for themselves and or their community. At a minimum the 'business case' for any given level of compensation should be based on:
- a) **Value:** How valuable is the land or resource involved? Based on an expert's advice, is the value likely to decline or increase over the remainder of the life of the instrument?
  - b) **Certainty:** How might the level of payment affect the flow of income over time. For example, would higher payments increase the risk of non payment and the need to cancel instruments resulting in lower income? Should the payments at the outset of the period be higher so as to guarantee a minimum level of return at the earliest possible point in time?
  - c) **Long Term Development:** How might the level of payment affect the ability of the community or individual to attract other investors and developers. Would a higher level of payment result in fewer transactions and lower overall income? How would an increase or decrease in the amount payable affect the level of economic development and overall returns?
  - d) **Administration Costs:** How would the level of payment affect costs such as late payments, collection, litigation, default rates? How will this affect the overall rate of return?
- 4.4 **First Nations may collect payments on behalf of the Crown.** First Nations with delegations under sections 53 and 60 of the *Indian Act* may collect payments due under an instrument. All such activities must be performed in accordance with the applicable legal requirements and this policy.



**4.5 All moneys collected must be properly deposited, paid and accounted for.**

All activity related to the collection and disposition of payments under an instrument must conform to the following requirements:

- a) **Full payment:** To the extent possible, the full amount owing must be collected. Where it is not, enforcement action should be considered in accordance with Directive 8-4.
- b) **Taxes:** All applicable levies, charges and taxes must be paid, and in some cases, collected with the payment and paid to the proper authority in the manner prescribed by law. However, at a minimum, the payment shall include the goods and services tax, with proof of other payments to be provided when requested.
- c) **Timeliness:** All payments must be collected and paid to the beneficiary or deposited as quickly as possible. The department in cooperation with First Nations will issue standards for the timely disposition of payment. These will be issued in the form of bulletins related to this directive.
- d) **Deductions:** No deductions for debts, taxes owing or other obligations are to be made from any payment collected or received before the monies owing to the beneficiaries have been paid to them.
- e) **Payment and Deposit:** All payments owing to a locatee must be paid to them in the form of a cheque payable to the Receiver General for Canada. All payments owing to a First Nation will be deposited to that First Nation's trust account. In those instances where the First Nation collects the rents as discussed in Section 5.4 of this directive, they must ensure that the foregoing processes are still followed.
- f) **Process:** All documents and activity related to the collection and disposition of payments must conform to the appropriate departmental policy and procedures. See Section 7, **References** of this directive for a complete list.
- g) **Accounting:** All those involved in administering payments must ensure that appropriate records, statements, reports and audits are in place. These must, at a minimum, cover payments owed, received, deposited or paid to beneficiaries and conform to all applicable requirements.

## 5. Process

5.1 **Procedures and methods vary with conditions.** There are several factors which will affect the choice of procedure and method of operation in administration of payments. The following are a list of some of these factors:

- a) **Office of Primary Responsibility:** Collection and disposition procedures followed by First Nations will vary slightly from those used by departmental staff.
- b) **Terms of Payment:** There are at least four basic methods of determining payment used in land and resource instruments as stated in Section 5.3 of this directive. The method specified in the arrangement will affect the procedure used.
- c) **Beneficiary:** Disposition and accounting procedures for instruments issued at the request of individual First Nation members may vary from those for instruments issued at the request of the First Nation.
- d) **Geographic Area:** The legal requirements and organizational arrangements affecting payment administration may vary somewhat among provinces. This may require some minor variation in procedure.

5.2 **Process Overview:** Administering payments involve the following major stages and deliverables.

- a) **Calculation - Method Selection:** This involves verifying the method of calculation stated in the instrument and deciding on how to apply it. This includes identifying any applicable taxes such as the Goods and Services Tax (GST). Where an instrument allows discretion, the beneficiary should be given the primary voice in any decision regarding whether or how to apply a method as allowed under the terms of the instrument and explained to them by the Lands Officer.
- b) **Calculation - Research:** All information needed to calculate or adjust payments is gathered and verified. This includes appraisals, audited financial statements and audited statements of resources extracted. The instrument will specify if the information is to be certified by an appropriate professional.
- c) **Calculation - Computing:** The required payments for a given period are calculated using the method specified in the instrument. This includes recalculating payments as a result of a rent review. The four main methods of calculation are summarized in Section 5.3 of this directive.

- d) **Calculation - Adjustment:** Payments are adjusted to reflect the terms of the instrument, calculations, negotiations and the wishes of beneficiaries.
- e) **Recording and Notice:** All interested parties are notified of the payment due under the terms of the instrument. The required amounts due, dates and other details of payment are recorded for monitoring purposes using monitoring tools, such as Netlands.
- f) **Collection:** Payments are received, checked, recorded and stored or transmitted to the appropriate office for processing.
- g) **Disposition:** Payments are recorded, deposited to the appropriate suspense or trust account and, where applicable, paid to the beneficiary.
- h) **Accounting:** Statements are prepared to show amounts due, received or outstanding. Once the payments are received, they are processed and accounted for to the beneficiary.

5.3 **Calculation Methods:** Calculation methods will, of course, vary with the terms of the instrument. The following is a summary of four basic methods which appear in the vast majority of our instruments:

- a) **Payment Schedule:** In this method, the amount of each payment for a given period is specified in a schedule included in or attached to the instrument itself. This schedule should have been derived during negotiations and agreed to by the First Nation and or locatees.
- b) **Fair Market Rent:** This involves setting the level of payment based on the appraised value of the land or resources at the time of execution of the instrument. Future amounts are usually derived from rent reviews under the terms of the instrument.
- c) **Participation Rent:** This is usually combined with other forms of payment. Payments are adjusted to reflect the level of activity or revenue obtained by the grantee in a given period. The most common forms are percentage share of revenues, resource royalties and crop shares.
- d) **Adjustment Formula:** Under this method, payments or adjustments are calculated on the basis of a specific formula. These will vary considerably but will often reflect the same factors as other methods as well as factors such as inflation and interest rates.

- 5.4 **Authority to collect and receive funds:** Eligible First Nations may obtain authority to collect and receive payments owing under an instrument on behalf of the Crown. The entry criteria, conditions and process for obtaining delegated authority are specified in Chapter 11 of this manual.
- 5.5 **Other process requirements apply.** All applicable departmental and government policies and procedures for the management of public moneys shall also be followed. These are included in this directive under Section 7, **References**.

## 6. Implementation

- 6.1 **Scope:** This directive applies to all activities involved in calculating, collecting, disposing of or accounting for payments under a land or resource instrument issued under the *Indian Act*. It **does not apply** to any of the following types of payments or benefits:
- a) **Payments under other statutory or regulatory schemes.** This directive does not apply to payments made under other acts or regulations such as the *Indian Oil and Gas Act*.
  - b) **Payments made under other arrangements.** This directive does not apply to payments made under an instrument or understanding outside the *Indian Act* such as buckshee leases or customary allotments.
- 6.2 **Effective Date:** Upon distribution, this directive will replace Directive 8-2 issued on January 29, 1999, and will remain in effect until it is cancelled or replaced.
- 6.3 **Responsibilities:** All regions are to implement collection policies and First Nations who collect payments are also required to implement collection policies and procedures.

## 7. References

- 7.1 **Other Chapters:** The negotiation and calculation of payments is also addressed in Chapters 3, 6 and 7 of this manual.
- 7.2 You may also wish to consult the following references:
- a) *Departmental Financial Management Manual, DRM 10-8.* This lays out policies and procedures for the management and administration of public moneys.
  - b) Indian Moneys Manual.

## Directive 8-3

# Compliance Monitoring

### 1. Purpose

- 1.1 **This directive sets out the policies and procedures for compliance monitoring.** It provides background on the policies and procedures which govern compliance monitoring of land and resource instruments under the *Indian Act*.

### 2. General

- 2.1 **What is compliance monitoring?** When we monitor, we compare the actual to the expected. In the case of compliance, what we expect is laid down as a set of rules or requirements:
- a) **Inspection:** We gather data about what is actually happening.
  - b) **Detection:** We compare the data on what is happening to our rules about what is supposed to happen. We note, record and explain any differences.
  - c) **Reporting:** We put our data and analyses into a form that can be used to decide what action, if any, to take. We then let everyone involved in these decisions know what we have found.
- 2.2 **What do we monitor?** We monitor grantees to see if they are living up to the terms of an instrument. This could be anything from ensuring compliance with building codes, to paying rent, to treating their sewage. In this directive we will generally refer to all of these requirements as 'items' or 'terms'.
- 2.3 **When monitoring an instrument,** it is prudent to inspect both the land and instrument file on a periodic basis. This will involve two kinds of inspection:
- a) **Site Inspections:** We inspect the location, environment, physical condition and use of land and resources. We use this to confirm that grantees meet the conditions of the instrument in these areas and have not changed or added to the intended use without the Crown's consent.

- b) **Desk Inspections:** We use inquiries and file reviews to confirm that the grantee has met such terms as payments, approvals, insurance provisions, applicable certificates and to ensure that their corporate status is still in good standing.
- 2.4 The department wants to use monitoring to achieve land and resource administration objectives and take corrective action when necessary. We and our partners do this in three ways:
- a) **Uphold the law and contracts:** We monitor as required by statute or the terms of an instrument.
- b) **Prevent problems:** When we inspect sites and paperwork in a visible way, we encourage compliance. This in turn should prevent future problems.
- c) **Solve problems:** We use monitoring to spot those cases where action is needed. We also use it to help us decide on a course of corrective action when required.

#### EXAMPLE 1. - MONITORING FUNCTIONS

**How we monitor:** Instruments such as leases often impose conditions on the grantee. We monitor both the actual parcel(s) of land and the required documentation from the grantee to make sure that they are living up to their contractual commitments. The following are some examples of the monitoring function:

1. **Inspection:** At the site, we may check the condition of the land, buildings and the environment or other applicable items. At our desks, we may check for certificates of valid insurance, for compliance of terms or for certification of corporate or financial status.
2. **Detection:** There are times when terms are not being met. For example, buildings may be found in disrepair. When this happens, we will record the facts and if necessary, gather evidence and take appropriate action under the terms of the instrument.
3. **Reporting:** In very serious cases, such as a toxic waste spills, we would report immediately to an agency such as Environment Canada who has the authority to take the necessary action under their legislation. We would use reports on other issues such as unpaid insurance to make decisions and advise those involved of the consequences for failure to comply.

- 2.5 **Monitoring may involve many parties.** In most cases there are a number of groups and individuals with an interest in the compliance monitoring of instruments. These groups include:
- a) **Beneficiaries:** the First Nation communities or individuals who directly benefit from the instrument. Those parties want to make sure that all the benefits owed to them are received, and ensure the preservation of their land and resources during the term of the instrument.
  - b) **First Nation Councils:** who want to preserve community lands, resources and the environment. They also want to ensure that their community laws and standards are followed by the grantee.
  - c) **Grantees:** who may be required to provide information or evidence to support monitoring terms of their instrument. They are also affected by any action taken as a result of departmental or 53/60 First Nation monitoring. Consequently, the grantee will want to avoid or reduce the costs involved in any remediation measures by ensuring compliance.
  - d) **Enforcement and Regulatory Agencies:** who also have a mandate to monitor and enforce their regulatory requirements ie: DFO . These agencies are often involved in the decision to act and assess mitigative measures when needed, based on a report of non-compliance and their legislative requirements.
  - e) **Other Parties:** This includes all those who may be affected by the grantee's activity ie: Health Canada when dealing with septic fields or restaurants. Off-reserve land holders or businesses who may be impacted by an activity on the reserve. They often push for stringent monitoring to protect themselves and may monitor some items on their own behalf.

### 3. Authority

- 3.1 **There is no statutory authority.** The authority to monitor compliance with land and resource instruments flows from the contractual requirements imposed in the instrument.



## 4. Policy

4.1 **We will monitor based on priorities.** The department will arrange to monitor compliance with certain terms on the basis of the following criteria and priorities:

- a) **Basic Priorities:** All items which involve a major risk to health, safety, lands, resources, environment or personal liability **must** be monitored.
- b) **Legal Requirements:** All monitoring required under an applicable statute or the terms of an instrument must be carried out. This only applies to clauses which direct or promise that monitoring will take place.
- c) **Materiality:** Monitoring should focus on those items which could have a major impact on First Nations, the Crown or have health and safety concerns.
- d) **Effectiveness:** Priority should be given to cases where monitoring is likely to prevent or correct problems.
- e) **Risks:** Priority should be given to those items which involve higher risks.
- f) **Costs and Benefits:** Those items where the benefits of monitoring outweigh the cost of non-compliance, such as rent reviews, should have higher priority.
- g) **Transactions:** There is usually a greater risk and a higher standard of care when an interest is issued, renewed or has expired. Consequently, great care should be taken when addressing these instruments. We should ensure the terms are manageable and that the ability to monitor is available before an instrument is issued or renewed. Before an instrument is renewed the existing infrastructure should be assessed for wear and tear and whether or not it will last for the term of the extension. Further, the instrument should be modified to reflect current conditions and any additional monitoring requirements that may now apply. When an instrument has expired or will expire, we need to ensure that all the terms of the instrument have been fulfilled and that any de-commissioning will be or has been done to an acceptable standard. In some cases, we may need to provide notice that the instrument is cancelled and that there will be no tenancy at will.

- 4.2 **Those who benefit should support monitoring.** To the maximum extent possible, all those who benefit from an instrument or from monitoring should contribute toward it. The department will therefore make every effort to enforce or encourage the following practices:
- a) **Self-Monitoring:** We will enforce all terms which require grantees to submit acceptable evidence of compliance at their own expense. We will also encourage grantee groups to monitor their agents, sub-tenants and other invitees allowed under the terms of the instrument, or face possible penalties under the terms of the instrument.
  - b) **Third Party Monitoring:** Wherever possible, other groups and agencies with an interest in monitoring a particular item will be asked to do so. This would normally include enforcement and regulatory agencies, beneficiaries, First Nation Councils, and interested third parties.
  - c) **Whistle Blowing:** All those with an interest in enforcing any item will be encouraged to report any information which may assist with the monitoring of the instrument.
  - d) **Cost Recovery:** Wherever possible, the department will seek to recover inspection costs from grantees, beneficiaries or other interested parties.
- 4.3 **The department will seek to respect all legitimate rights and interests.** All systems and practices set up under this directive must respect the following basic principles:
- a) **Consultation and Partnership:** All interested parties should have the chance to offer their views and assist in planning and executing monitoring strategies.
  - b) **Fairness and Equity:** The rights and interests of all those involved must be respected and, where necessary, fairly balanced.
  - c) **First Nation Control:** First Nations should be offered, when available, every opportunity to influence and control monitoring.

- 4.4 **Monitoring should consider other goals.** We should consider other departmental, government and First Nation goals when planning our monitoring strategy. Examples include:
- a) **First Nation:** Bylaws, zoning requirements or any other community concerns.
  - b) **Statutes:** Acts such as the *Fisheries Act*, *Indian Act* and *Canadian Environmental Protection Act* related to the protection of lands environment and resources, or any other applicable legislation.
- 4.5 **Monitoring strategies are required.** All regions and all First Nations funded for instrument administration must prepare annual monitoring strategies. All such strategies should meet the following requirements.
- a) **Inventory:** They must be based on an assessment of the risks, costs and benefits of monitoring options for all active land or resource instruments.
  - b) **Scope:** They must cover off all basic and legal requirements. They should also address the highest priorities within existing resources.
  - c) **Timeliness:** They should ensure that the timing and frequency of monitoring will be effective in preventing or correcting problems.
  - d) **Partnership:** They should include activities aimed at gaining, keeping or using the support of other parties to monitor effectively.
  - e) **Efficiency and Effectiveness:** They should consider the best use of resources to meet monitoring goals.

**EXAMPLE 2 - PARTNERSHIP ACTIVITIES - THE 'THREE C' APPROACH**

**So what is a 'partnership activity'?** Any activity aimed at getting the interested parties to work together in monitoring an instrument. Here is a list of some of the main types of partnership activities with examples of each one.

1. **Communication:** Provide a copy of the executed instrument to the grantee and remind them of their responsibilities and how they may be monitored. Hold a meeting to explain the benefits of helping with instrument monitoring to the relevant First Nation community or individual band member.
2. **Consultation:** Organize a meeting of all interested parties to discuss the best time and method for doing site inspections.
3. **Cooperation:** Put in place a memorandum of understanding with all of the agencies involved in monitoring a particular area or item. Agree to a joint monitoring schedule which will help the First Nation to monitor by-laws and the department to monitor instruments.

## 5. Process

- 5.1 **Procedures will vary with conditions.** Managers and staff are encouraged to vary procedures and methods to suit each case within the basic policy rules set out in this directive.
- 5.2 **Process Overview:** Monitoring instruments involves the seven stages. The following is a breakdown of those stages:
  - a) **Assessment** involves the review of instruments to assess the risks, costs and benefits of monitoring options. This review becomes the instrument inventory.
  - b) **Consultation** involves interested parties in the planning and execution of monitoring strategies. This could result in memoranda of understanding, joint monitoring strategies or other types of agreements to achieve this goal.
  - c) **Planning** involves the allocation of resources and the scheduling of activities to meet goals.

**Process Overview (continued)**

- d) **Desk Inspections** involve the review of information to assess compliance with items such as payments, accounting reports and insurance renewals.
- e) **Site Inspections** involve checking the land, resources and related information to confirm compliance with items such as site maintenance.
- f) **Reporting** involves the recording of inspection findings and passing them to all interested parties for action.
- g) **Evaluation** involves the review of monitoring activities against needs and goals.

**6. Implementation**

- 6.1 **Scope:** This directive applies to all inspection, detection and reporting activities related to land and resource instruments.
- 6.2 **Effective Date:** This directive will replace Directive 8-3 issued in February, 1999 and will remain in force until cancelled or replaced.
- 6.3 **Drafting:** The department has revised its drafting policies to reflect the principles stated in this directive.
- 6.4 **Responsibilities:** All regions and all First Nations funded for land or resource administration are responsible for implementing the policies and procedures in this directive.

**7. References**

- 7.1 **Other Chapters:** The drafting of instruments monitored under this directive is covered in Chapters 3, 6 and 7 of this manual.
- 7.2 You may also wish to consult the following references:
  - a) The *Risk Management Guide* published by the Lands and Environment Branch of Indian and Northern Affairs Canada.
  - b) Chapter 7 of the Indian and Northern Affairs Canada Forestry Manual
  - c) Chapter 8 of the *Indian and Northern Affairs Minerals Policy and Procedures Manual*.

## Directive 8-4

### Ensuring Compliance

#### 1. Purpose

1. **This is a policy and procedure directive**, that states and explains the background principles and processes for ensuring compliance with land and resource instruments.

#### 2. General

- 2.1 **What do we mean by ‘ensuring compliance’?** It means getting people to live up to the terms of an instrument and dealing with those cases where they do not. It involves three major types of activities, with each of these types of activities involving a number of different actions depending on the situation. Table 1 below illustrates what these actions are and how they relate to these three activities:
  - a) **Encouraging Compliance:** Providing information, incentives, penalties and examples to have people comply on their own.
  - b) **Enforcing Compliance:** Taking action to stop a breach or default of the terms or to get people to live up to them.
  - c) **Remedial Action:** This occurs when there is damage or harm as a result of a breach or default. In this case, there are two types of response. The first is to **stop or contain** the damage or harm. The second is to **repair** it.

TABLE 1 - SUMMARY OF POSSIBLE ACTIONS			
Major Action Options (* means that legal action will likely be involved)	Encouraging Compliance	Enforcing Compliance	Remedial Action
<b>Provide Information:</b> Handouts, meetings,	✓		
<b>Keep in Touch:</b> Contact key players, open door approach	✓		
<b>Remain Visible:</b> Inspections, posting signs etc.	✓		
<b>Investigate Issues:</b> Follow-up on reports		✓	✓
<b>Work with Key Players:</b> Cooperate on issues	✓	✓	✓
<b>Give Notice:</b> Advise that problem exists		✓	✓
<b>Resolve Issue:</b> Alternative dispute resolution		✓	✓
<b>Stop Activity/Damage*:</b> Eg. halt construction		✓	✓
<b>Impose Penalty*:</b> Fines, forfeiture, seizure etc.		✓	✓
<b>Repair Damage*:</b> Eg. clean up contamination			✓
<b>Lay Charges*:</b> Eg. under <i>Fisheries Act</i>		✓	
<b>Cancel Instrument*:</b> Usually last resort		✓	

2.2 **Who is involved in ensuring compliance?** This will vary with the terms which we are trying to enforce and the parties affected by those terms. As with monitoring, it could involve any of the key players described below:

- a) **Beneficiaries** are First Nation communities and/or individuals who have an interest in ensuring that they receive all the benefits owed them and to preserve the value of their land and resources. They are usually consulted on decisions affecting their interests, and may also be party to some of the actions taken during the monitoring period of the instrument.
- b) **First Nation Councils** will want to preserve the land, resources and environment and to ensure that all applicable laws are enforced and community standards met.
- c) **Grantees** are the party(s) who must comply with the terms of the instrument and are most affected by any action taken to enforce the instrument. They will want to avoid or reduce the costs of non-compliance, including any penalties for not complying.

- d) **Enforcement and Regulatory Agencies** such as the Department of Fisheries and Oceans, who have the authority to take enforcement action when a violation to their Act has occurred. Others, such as the Department of Justice or Solicitor General, must be involved in certain types of decisions or legal actions.
- e) **Other Parties** are all the others affected by the grantee's activity. Other parties often include communities, residents or businesses in the area. They can also include the province, mortgagor, or sub-lessees. Some of these parties may be able start an action related to a breach or default on their own. In many cases, they may have a legitimate interest in enforcement or remedial action decisions.

2.3 **Our objective is to prevent or correct problems.** As with monitoring, ensuring compliance is aimed at achieving land and resource administration objectives. We and our partners will use it to support these objectives in three ways:

- a) **By upholding legal obligations:** We will act as required by statutes and the terms of our contracts.
- b) **By preventing problems:** We will encourage grantees and others to comply with these terms. This will help us to avoid many problems.
- c) **By correcting problems:** The actions taken will correct many of the problems that result when people do not comply. They may also repair at least some of the harm or damage which may have resulted.

### 3. Authorities

3.1 **The *Indian Act* only addresses adjustments.** Subsection 59(a) of the Indian Act empowers the Minister to adjust contracts. In all other cases it is the instrument itself which is the source of authority to ensure compliance.

*59. The Minister may, with the consent of the council of a band,*

- (a) reduce or adjust the amount payable to Her Majesty in respect of a transaction affecting absolutely surrendered lands, designated lands or other lands in a reserve or the rate of interest payable thereon;*



## 4. Policy

- 4.1 **Wherever possible, we will seek compliance through cooperation.** The department is committed to working with all key players to ensure compliance and to solve problems. Consequently, we will make every effort to:
- a) **Share information and views:** We will seek to make key players aware of relevant facts and positions while maintaining confidentiality.
  - b) **Encourage and rely on voluntary compliance:** To the maximum extent possible, the department will first seek to ensure compliance through cooperation. We will share information and work with grantees and others to promote and encourage voluntary compliance.
  - c) **Address breaches and defaults on a cooperative basis:** Wherever possible, the department will seek to remedy defaults or breaches and repair damages through cooperation with grantees and other key players.
  - d) **Resolve disputes through consensus and win-win negotiation:** Where disputes arise, the department will make every reasonable effort to first resolve them on an informal or cooperative basis.
  - e) **Reserving arbitration and the courts as a last resort:** In some cases, the need to resolve disputes in a more formal manner will arise. Wherever possible, such cases should be resolved using processes which avoid or minimize an adversarial, win-lose approach.
- 4.2 **The department will act swiftly in urgent cases.** Our main goal is to preserve health, safety, the environment, lands and resources. We will therefore, act quickly when dealing with situations which are deemed an emergency, and if the situation is very serious and the urgency great, this may involve acting without notice, consent or cooperation.
- 4.3 We will assess every breach or default and decide on the best course of action, given the facts of the situation . We will also assess the risk, cost and the benefit to all key players when making such decisions.

- 4.4 **We will ensure compliance based on priorities.** The department will ensure compliance with certain terms on the basis of the following criteria and priorities:
- a) **Basic Priorities:** All items which involve a major risk to health, safety, lands, resources, environment or personal liability **must** be monitored.
  - b) **Legal Requirements:** All action required under an applicable statute or term of an instrument must be taken. This only applies to clauses which direct or promise that monitoring will take place.
  - c) **Materiality:** We will give priority to taking action on issues which could have a major impact on First Nations, the Crown or are health and safety related.
  - d) **Effectiveness:** Priority should be given to cases where the action taken is likely to prevent or correct problems.
  - e) **Risks:** Priority should be given to those items which are deemed a high risk.
  - f) **Costs and Benefits:** Those items for which the benefits of monitoring outweigh the costs of not monitoring should have higher priority.
- 4.5 **Costs should be borne by those in breach or those who benefit.** Wherever possible, the department will seek to recover the costs of an action involving a breach or default from those responsible. Where there is no breach or default, the department will seek to recover costs from the grantee and the beneficiaries.
- 4.6 **We will consider and act on decisions as fairly as possible.** To the best extent possible, we will respond to breaches, defaults and disputes based on the principles stated below.
- a) **Respect for the Law:** All statutory, contractual and fiduciary requirements should be respected and fulfilled.
  - b) **Consultation:** Wherever possible, all those with a stake in a decision on a response should have the chance to state their views.
  - c) **Fairness and Equity:** The rights and interests of all those involved should be respected, and where necessary, fairly balanced.
  - d) **Due Process:** Decisions and actions should be taken in a manner that gives those affected the chance to defend and protect their rights and interests as part of a fair and impartial process.

- 4.7 **All legal actions must be taken in consultation with the proper agencies.** Regions and First Nations considering an enforcement or remedial action must consult the proper enforcement agencies before they act. At a minimum this must include:
- a) **The Department of Justice** who must be consulted prior to any legal action taken. Although this does not necessarily include notice to the grantee, it is prudent to keep them apprised on the desired course of action. Failure to do so may prejudice future actions. In the case of First Nations with delegated authorities, this will include any action that they may bring as the lessor.
  - b) **The Solicitor General** who must be consulted regarding all criminal proceedings involving reserve lands.
  - c) **Other Agencies** when those actions involve matters which fall under the jurisdiction of another federal or provincial agency, such as Fisheries and Oceans or Environment Canada. Where this occurs, that agency must be consulted when action is taken.
- 4.8 **The principle of ‘minimum response’ applies.** When considering responses and actions those which are less drastic should be considered first. Where they appear to offer a good chance of resolving a breach, default or dispute, they should be adopted before more drastic action is taken.

## 5. Process

- 5.1 **Overview:** There are two sets of processes. The first is encouraging compliance which is a part of normal client relations. The second is enforcing compliance and taking remedial action. It is governed by legal and policy rules.
- 5.2 **Encouraging Compliance:** Regions and First Nations are responsible for setting up processes to encourage grantees and others to comply with the terms of instruments. At a minimum, such processes should include:
- a) **Initial Contact:** established when the executed instrument is provided to the grantee. At that time, the grantee should be instructed to familiarize themselves with the terms of the instrument and contract their own legal counsel should they require an interpretation of their rights and obligations under the instrument.
  - b) **Reminders:** notices of upcoming requirements such as insurance certificates, self-monitoring reports or annual payments may be used where they are considered cost effective or are within operational abilities.

- c) **Interim Contacts:** regular meetings with grantees and other parties can be used as a means to discuss issues and ensure compliance of the terms of the instrument.

5.3 **Enforcing Compliance and Remedial Action:** in both of these cases, the process followed is largely the same. What differs are the actions taken. In general, the process will include the major phases set out below.

- a) **Checking the Facts:** This occurs when a breach, default or dispute is first reported. The responsible office will verify the details of the report and obtain any additional information which may be needed to reach a decision.
- b) **Reviewing Options:** At any given stage, there will usually be a number of different responses or actions. Responses can be formulated by reviewing the instrument and consulting enforcement agencies. In each case the risk, cost and benefit of each option should be assessed.
- c) **Making Decisions:** Some of the decisions regarding responses or actions are governed by the policies set out in this directive. In some cases, a business decision must be reached through consultation with the Department of Justice, Public Works and Government Services or any other agencies with the required expertise to assist in making an informed business decision.
- d) **Taking Action:** As shown in Table 1, this can range from giving notice as provided in the terms of the instrument, to laying criminal charges.
- e) **Assessing Results:** The purpose of this stage is to find out if the action taken has resolved the breach, default or dispute and repaired the damage done. If it has not, the process should go back for review of the options and the consideration of a different response or action.

5.4 **Alternative Dispute Resolution:** Some instruments provide for an alternative to Federal Court for resolution of disputes over the terms of the instrument. These terms are generally found in instruments that are a low risk. Where the instrument does not provide for dispute resolution, we may be able to seek agreement to engage an alternative dispute resolution process by mutual agreement.

## 6. Implementation

- 6.1 **Scope:** This directive applies to all activities aimed at ensuring compliance with land and resource instruments.
- 6.2 **Effective Date:** This directive is effective as of the date of issue and will replace Directive 8-4 issued on April 29, 1999 and will remain in force until cancelled or replaced.
- 6.3 **Drafting:** Consult Chapter 3, 6 and 7 for information on the drafting and negotiation of instruments.
- 6.4 **Costs:** Regions and First Nations with delegated land management authorities are responsible for allocating sufficient resources to meet the requirements of this policy.
- 6.5 **Responsibility** for the implementation of this directive and related processes and procedures are delegated as follows:
- a) **Regions and First Nations with Delegated Authority** are responsible for setting up processes to encourage and enforce compliance with the terms of instruments and to take proper remedial action. All such processes must meet the requirements set out in this directive.
  - b) **Headquarters Land Directorate** is responsible for interpreting, updating and amending as needed the policies set out in this directive. They are also responsible for helping regions and First Nations obtain the authorities, resources and tools needed to implement the policies, processes and procedures stated here.
  - c) **Enforcement Agencies** are responsible for assisting the department with actions for which they have a legal mandate.

## 7. References

7.1 **Other Chapters:** The drafting of instruments enforced under this directive is covered in Chapters 3, 6 and 7 of this manual.

7.2 You may also wish to consult the following references.

- a) The *Risk Management Guide* published by the Lands and Environment Branch of Indian and Northern Affairs Canada.
- b) Chapter 7 of the Indian and Northern Affairs Canada Forestry Manual
- c) Chapter 8 of the *Indian and Northern Affairs Minerals Policy and Procedures Manual*.

## Directive 8-5

# Administering Transactions

### 1. Purpose

- 1.1 This is a policy and procedure directive that will state and explain the background principles and processes for administering transactions related to land and resource instruments.

### 2. General

- 2.1 **Transactions, transfers or altered interests.** Any process which has the effect of transferring or changing the interests granted under a land or resource instrument is a transaction. Transactions may include:
- a) **Assignments and Transfers:** The transferring of the current grantee's interest to another eligible party who will become the new grantee. It should be noted however, that a grantee can not assign his previous obligations under the terms of the instrument ie: environmental damage, as our instruments provide for "survival of the obligations".
  - b) **Mortgages:** A pledge of an interest as a security against a debt. Where a default occurs, it may result in the transferring of the grantee's interest, provided the instrument has provisions to do so, to the lender.
  - c) **Sub-leases:** The transferring of a portion of the grantee's interest to another party. The sub-lessee will receive a lesser interest than the head lessee and does not establish a relationship with the Crown.
  - d) **Renewals:** There are two forms. The first essentially extends a lease or permit for a further period under substantially the same terms. The second permits the issuance of a new lease or permit to the same grantee with the terms open to negotiation. Consult with Directive 7-3 for more information regarding locatee leasing.
- 2.2 **The department must approve transactions.** The *Indian Act* requires the consent of the Minister for assignments. Most land and resource instruments state that the Minister must pre-consent to an assignment, transfer, sub-lease, renewal or mortgage.

- 2.3 **New grantees must assume the same responsibilities.** Most leases and permits provide that anyone assuming an interest is bound by the terms of the original instrument. The same is true for those assuming part of an interest as in the case of a sub-lease.
- 2.4 **Transactions that put the Crown and/or First Nation at risk.** In all cases, entering into a transaction will involve risk. The moment the instrument is signed there is a risk to the Crown and/or First Nation for failing to monitor contractual requirements. This risk is shared with the grantee. Risk must form a large part of the business decision to enter into an instrument with a third party. As much risk as possible should be mitigated through the clauses negotiated in the instrument. Decisions can be effected by the parties to whom the instrument is granted. Risk to the land, payment schedules and monitoring requirements are all factors in making a mitigated risk decision. The Department of Justice can assist in identifying other risks and language for the instrument to mitigate that risk. You should read *Land and Resource Administration Risk Management Guide* for more information.
- 2.5 **Our objective is to screen grantees and enforce instruments.** The approval of transactions has two objectives:
- a) **Screening Grantees:** Most transactions have the effect of transferring an interest in reserve land from one grantee to another. The approval process enables us to screen new grantees. This helps us to ensure that new grantees have good financial, contractual and environmental records.
  - b) **Enforcing Terms:** Most transactions require an additional instrument of some sort. The approval process enables us to ensure that the new grantee is bound by all of the terms of the original instrument.

### 3. Authorities

- 3.1 **Transactions other than renewals are covered by sections 53(3), 54 and 55 of the *Indian Act*.** More specifically the *Indian Act* provides that:

53. (3) *No person who is appointed pursuant to subsection (1) or who is an officer or servant of Her Majesty employed in the Department may, except with the approval of the Governor in Council, acquire directly or indirectly any interest in absolutely surrendered or designated lands.*



54. *Where absolutely surrendered lands are agreed to be sold and letters patent thereto have not been issued, or where designated lands are leased or an interest in them granted, the purchaser, lessee or other person who has an interest in the absolutely surrendered or designated lands may, with the approval of the Minister, assign all or part of that interest to any other person.*
- 55.(1) *There shall be kept in the Department a register, to be known as the Surrendered and Designated Lands Register, in which shall be entered all the particulars in connection with any transaction affecting absolutely surrendered or designated lands.*
- (2) *A conditional assignment shall not be registered.*
- (3) *Registration of an assignment may be refused until proof of its execution has been furnished.*
- (4) *An assignment registered under this section is valid against an unregistered assignment or an assignment subsequently registered.*
56. *Where an assignment is registered there shall be endorsed on the original copy thereof a certificate of registration signed by the Minister or by an officer of the Department authorized by him to sign such certificates.*

## 4. Policy

- 4.1 **Where possible, we will seek to exercise the right to consent.** The right of consent to a transaction enables us to protect the interests of First Nations and the Crown. Regions and First Nations with delegated authorities will therefore exercise this right wherever possible before a transaction takes effect.
- 4.2 **Consent will only be granted where our criteria has been met.** Consent to a transaction shall only be granted where the request meets the following criteria:
- a) **Grantee Credit:** The proposed grantee has a good credit rating.
  - b) **Grantee Environmental Record:** The proposed grantee has not been charged or sued for harming the environment in any jurisdiction in Canada within the past two years.
  - c) **Grantee Contract Record:** The proposed grantee has not been involved in a lawsuit or dispute regarding an interest in land in any jurisdiction in Canada within the past two years.
  - d) **Grantee Eligibility:** The proposed grantee must be eligible to hold the interest being granted, and if incorporated, is a company in good standing.

- e) **Valid Grantor:** The party requesting the transaction is in clear possession of the interest being transferred and has the right to request the transfer.
- f) **Adequate Description:** The description of the parcel or parcels involved in the transaction meets departmental standards for registration as described in the Lands Registry Manual.
- g) **Appropriate Circumstances:** The parties, terms, compensation, timing and other known circumstances of the transaction are free of any grounds of doubt that it has been concluded fairly and in good faith.
- h) **Proper Documentation:** All documents related to the transaction must meet the requirements set out in the original instrument, the *Indian Act* and this policy. They must also be complete and accurate.
- i) **Beneficiary Consent:** The department will request the consent of beneficiaries to any transaction related to an instrument. It will not approve a transaction without such consent unless required to do so under the terms of the instrument or an applicable law.

4.3 **Lands Managers must establish review processes.** All regions and First Nations with delegated authorities must establish processes to review and approve transactions. These must meet the following requirements:

- a) **Risk Assessment:** They must enable us to assess the risks, costs and benefits related to a proposed transaction or class of transactions.
- b) **Review Criteria:** They must apply all of the approval criteria stated in Section 4.2 of this directive.
- c) **Grantee Checks:** They must include the review of grantee credit and track record with respect to the environment and contract compliance.
- d) **Document Checks:** They must include the review of all documents related to the transaction relative to the criteria in Section 4.2.
- e) **Due Process:** They must ensure that beneficiaries are asked to consent to a transaction. They must also ensure parties with an interest in the transaction have an opportunity to make their views known.

4.4 **Transactions will be monitored.** The department is committed to making every reasonable effort to ensure that transactions are reviewed before taking effect. To this end the department will:

- a) **Monitor Transactions:** To the extent possible, desk audits will verify whether transactions related to an instrument have been reviewed and approved and meet, among other things, the criteria stated in Section 4.2.
- b) **Screen Documents:** All transaction documents will be reviewed against the registration requirements of the Indian Lands Registry.
- c) **Give notice:** Where possible, the department will seek to advise the parties to transactions of the relevant legal and policy requirements, but is under no obligation to do so.

## 5. Process

5.1 **Overview:** Administering transactions involves three major tasks:

- a) **Communicating:** Advising the parties to transactions of the requirements of this policy. This is an ongoing public information function which does not involve a separate process or procedure.
- b) **Monitoring:** This involves verifying that third parties occupying reserve or designated lands are there under the terms of a valid transaction. It also includes reviewing transaction documents against the requirements set out in this policy. This is part of the monitoring processes described in Directive 8-3 of this chapter.
- c) **Approval:** Reviewing, correcting, approving and registering transactions.

5.2 **Approval Process:** An approval process set up under Section 4.3 of this directive should include the following major functions:

- a) **Application:** The proponent submits a request for approval of a transaction which includes all of the information needed to confirm that the criteria stated in Section 4.2 have been met.
- b) **Review:** The Lands Officer reviews request for approval against the criteria stated in Section 4.2. This will at a minimum, include the checks specified in Section 4.3.

- c) **Consent:** The Lands Officer verifies that the beneficiary of the instrument has consented to the transaction or obtains consent in a satisfactory form.
- d) **Decision:** Where all of the criteria stated in Section 4.2 have been met, the Lands Officer submits the documents for approval by the delegated officer. Where these criteria have not been met, the Lands Officer returns the application to the proponent and explains why it cannot be approved.

## 6. Implementation

- 6.1 **Scope:** This directive applies to all activities related to transactions under the terms of land and resource instruments.
- 6.2 **Effective Date:** This directive is effective as of the date of issue. It will replace Directive 8-5 issued on June 11, 1999 and will remain in force until cancelled or replaced.
- 6.3 **Drafting:** The department has revised its drafting policies to reflect the principles stated in this directive.
- 6.4 **Costs:** Regions and First Nations with delegated land management authorities are responsible for allocating sufficient resources to meet the requirements of this policy.
- 6.5 **Responsibilities:** Responsibility for the implementation of this directive and related processes and procedures is delegated as follows:
  - a) **Regions and First Nations with Delegated Authority:** Are responsible for setting up processes to monitor and approve transactions under land and resource instruments.
  - b) **Headquarters Land Directorate:** is responsible for interpreting, updating and amending as needed the policies set out in this directive. They are also responsible for helping regions and First Nations to obtain the resources and tools needed to implement the policies, processes and procedures stated here.
  - c) **Indian Lands Registry:** Is responsible for reviewing transaction documents covered by this policy relative to their registration requirements.

## 7. References

- 7.1 **Other Chapters:** The drafting of instruments administered under this directive is covered in Chapters 3, 6 and 7 of this manual.
- 7.2 You may also wish to consult the following references:
- a) The *Land and Resource Administration Risk Management Guide* published by the Lands and Environment Branch of Indian and Northern Affairs Canada.
  - b) Chapter 7 of the Indian and Northern Affairs Canada Forestry Manual
  - c) Chapter 8 of the *Indian and Northern Affairs Minerals Policy and Procedures Manual*; and
  - d) Chapter 12 of this manual on the criteria requirements under the *Canadian Environmental Assessment Act*.

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**LAND TRANSACTIONS UNDER SECTION 35**

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# Directive 9-1

## Transactions Under Section 35

### 1. Purpose

- 1.1 This document explains when and how reserve lands may be transferred or granted under section 35 of the *Indian Act*.

### 2. General

- 2.1 Definitions in this directive:

- a) **Exchange Lands**, means lands held by the expropriating authority that form part or all of the compensation to a First Nation for a Section 35 Transaction.
- b) **Expropriating authority**, means a provincial government, a municipal or local authority, or a corporation that federal or provincial law authorizes to take or to use lands or any interest in lands without the consent of the landowner.
- c) **Fact Letter**, means a letter from Canada sent both to a First Nation and to the expropriating authority setting out the substantive facts (including compensation, legal descriptions, the handling of third party interests and other requirements set out in the Federal Requirements List) of the Section 35 Transaction.
- d) **Fair Market Value**, means the most probable price that a property will bring in a competitive and open market under all conditions requisite to a fair transaction and not affected by undue stimulus, with the seller and purchaser each acting prudently and knowledgeably, and assuming that the property is held by the seller in fee simple (notwithstanding that the property may have been reserve lands and inalienable except to the Crown) and has no charges or encumbrances existing against title.
- e) **Federal Requirements List**, means the list of standard legal and policy requirements of Canada necessary to process a Section 35 Transaction, as set out in Annex C: Federal Requirements List.



- f) **Land Status Report**, means a report that contains all the pertinent information regarding the encumbrances and/or interests on a particular parcel of reserve land. The report contains information from the Indian Lands Registry, and appropriate departmental files. The report identifies existing registered interests such as leases, permits, easements, Certificates of Possession, or encumbrances such as cardex holdings or surrenders. It should also contain information on former reserve lands which the expropriating authority may be transferring to Canada; the Lands officer should determine whether there are reversionary interests attached to such former reserve lands.
- g) **Locatee Lands**, means reserve lands which have been validly allotted under section 20 of the *Indian Act*, to which lawful possession is generally evidenced by a Certificate of Possession. Lawful possession is also held under "No Evidence of Title Issued" (NETIs), location tickets, Notices of Entitlement (NEs), or cardex holdings.
- h) Official Plan or **CLSR Survey**, means a graphical description of the boundaries of land prepared from field notes of a survey, confirmed pursuant to section 29, 39, 42, 43, or 44 of the *Canada Lands Surveys Act*.
- i) **Section 24 or 49 Transfer**, means a transfer of the right to possession of lands in a reserve by one or more locatees to the First Nation pursuant to sections 24 or 49 of the *Indian Act*, and approved by the Minister, to facilitate a Section 35 Transfer.
- j) **Section 35 Agreement**, means a final agreement between a First Nation Council and the expropriating authority, usually in the form of a letter or memorandum of understanding with respect to a Section 35 Transaction. This Section 35 Agreement must satisfy the requirements set out in **Annex C: Federal Requirements List**.
- k) **Section 35 Easement**, means the grant or transfer of less than a full interest in reserve lands to an expropriating authority for a specific purpose. When Canada grants or transfers less than a full interest under Section 35 of the *Indian Act*, the underlying interest remains with Canada and continues to have "reserve" status.
- l) **Section 35 Lands**, means reserve lands which are subject to either a proposed Section 35 Transfer or a proposed Section 35 Easement.

- m) **Section 35 Transaction**, is a generic term used to describe a Section 35 Transfer, or a Section 35 Easement, authorized pursuant to section 35 of the *Indian Act* and pursuant to the *Federal Real Property and Federal Immovables Act* ("FRPFIA").
  - n) **Section 35 Transfer**, means the grant or transfer of a full interest in reserve lands to an expropriating authority, in lieu of the expropriating authority acquiring the lands without the consent of the owner pursuant to its expropriation powers. The grant or transfer is usually made for a specific purpose and is subject to a requirement that the lands be returned to Canada when no longer needed for that purpose.
- 2.2 Various federal and provincial statutes allow the taking of private lands by provincial or municipal governments, a local authority and certain corporations. Such takings are known as expropriations. Normally, such powers of expropriation cannot be applied to reserve lands. However, under Section 35 of the *Indian Act* the Governor in Council may consent to the taking or using of reserve lands by an expropriating authority. After the Governor in Council consents to the taking or using of the lands, the lands may be taken or used under the expropriating legislation, or the Governor in Council may authorize a transfer or grant of the lands to the expropriating authority. The authorization of any Section 35 Transfer or Section 35 Easement is subject to any terms that the Governor in Council may prescribe.
- 2.3 Where the Governor in Council authorizes a Section 35 Transfer or Section 35 Easement, the actual grant or transfer is done under the FRPFIA.
- 2.4 A Section 35 Transaction triggers certain Crown responsibilities to the First Nation whose land is the subject of the transaction. In this respect, the Crown is obliged to ensure minimal impairment of the reserve lands by consenting to, granting or transferring only the minimum interest required in order to fulfill the public purpose for which the land is required. It should also be noted that the Governor in Council cannot consent to the taking or using of, nor authorize a grant or transfer of, a greater interest in land than the expropriating authority is authorized to take under its own expropriating legislation. The lands officer should determine (in accordance with any applicable policy or procedures or in consultation with the policy sector of the department and with DOJ) that sufficient evidence exists to support the conclusion that only a minimal interest in the reserve will be granted or transferred. In addition, departmental staff should carefully document all government dealings with the First Nation and the expropriating authority concerning the nature and extent of the interest to be granted under Section 35.

- 2.5 The policy set out in this Chapter is a national policy. However, departmental staff should be aware that it may be necessary for each region to address the specific needs of their respective province(s) in relation to Section 35 Transactions by a province.

### 3. General: Legal Interests Involved

- 3.1 The nature of the legal interests involved in Section 35 Transactions varies depending on the statutory power of the expropriating authority and the purpose for which the authority requires the land.
- 3.2 Legal title to reserve lands is vested in the federal Crown.
- 3.3 Under Section 35, if the statutory expropriation powers of the expropriating authority allow for the taking or using of a full interest, Canada may convey its full interest in the reserve land or it may convey a lesser interest, such as an easement.
- 3.4 The means used to convey Canada's interest depends on the nature of the expropriating authority. For example:
- a) When Canada conveys an interest in the reserve land to a municipal or local authority or a corporation, it "grants" that interest to the expropriating authority.
  - b) When Canada conveys an interest in reserve lands to a provincial government, it does not transfer the interest but "transfers the administration and control" of that interest in the lands.
- 3.5 When Canada grants its full interest to a municipal or local authority or a corporation, or when it transfers the administration and control **of its full interest** to a provincial authority, the granted or transferred lands lose their "reserve" status.
- 3.6 An easement is a right of use over the property of another. When Canada grants or transfers the administration and control of an easement under Section 35, the underlying interest remains with the Crown and continues to have "reserve" status.

- 3.7 As a matter of policy, when Canada grants or transfers the administration and control of any interest in reserve lands under Section 35, the Crown expressly retains a reversionary interest in those lands. The effect of this reversionary interest is that when the expropriating authority no longer requires the land for the purpose for which they acquired it, the interest granted or transferred is returned to Canada. This land is returned to Canada, but is not necessarily returned as reserve.

#### 4. General: Use of Section 35

- 4.1 While not a requirement of the *Indian Act*, Section 35 is usually used when an expropriating authority has negotiated an arrangement with the First Nation. The First Nation then asks Canada to grant or transfer the land or an interest in the land to the expropriating authority. If granting or transferring a less intrusive or destructive interest in the land can meet the expropriating authority's need for the land, it is the department's obligation to use the less intrusive option. At the very least, the best practice would be for the department to make the First Nation aware of the less intrusive option, if there is one.
- 4.2 Section 35 Easements are commonly used when a public utility requires land to run transmission lines through a reserve. Examples of such Section 35 Easements are aerial easements for high tension transmission lines and underground easements for pipelines, water lines and gas lines. However, following the *Opetchesaht* decision, many of these may be given by way of section 28(2).
- 4.3 The following example illustrates the range of uses which section 35 may satisfy. Remember that the expropriating authority's expropriation legislation must allow the proposed use and must allow for the expropriation of the interest proposed to be transferred; ie., the full or fee simple interest if that is the interest proposed to be transferred. Whenever possible, grant a less intrusive interest, such as a lease or permit, in any of the following situations.
- 4.4 When a grant or transfer of an interest in reserve land by the use of a Section 35 Transaction is proposed to be completed, the expropriating authority must provide the department with the following:
- a) evidence of its statutory power to expropriate the interest (tenure) it proposes be transferred to it;
  - b) a written rationale adequate to justify why such tenure is necessary for the use for which the land is proposed to be granted or transferred; and

- c) the methodology for assessing the value of the compensation proposed to be paid to the First Nation, which compensation should be shown to compensate for the full Fair Market Value and for the loss to the First Nation of the benefit of reserve status of the land to be granted or transferred. The First Nation's consent must acknowledge the granting or transferring of such an interest.

## 5. Authorities

### 5.1 Section 35 of the *Indian Act* states that:

- 35(1) *Where by an Act of Parliament or a provincial legislature Her Majesty in right of a province, a municipal or local authority or a corporation is empowered to take or to use lands or any interest therein without the consent of the owner, the power may, with the consent of the Governor in Council and subject to any terms that may be prescribed by the Governor in Council, be exercised in relation to lands in a reserve or any interest therein.*
- (2) *Unless the Governor in Council otherwise directs, all matters relating to compulsory taking or using of lands in a reserve under subsection (1) are governed by the statute by which the powers are conferred.*
- (3) *Whenever the Governor in Council has consented to the exercise by a province, a municipal or local authority or a corporation of the powers referred to in subsection (1), the Governor in Council may, in lieu of the province, authority or corporation taking or using the lands without the consent of the owner, authorize a transfer or grant of the lands to the province, authority or corporation, subject to any terms that may be prescribed by the Governor in Council.*
- (4) *Any amount that is agreed on or awarded in respect of the compulsory taking or using of land under this section or that is paid for a transfer or grant of land pursuant to this section shall be paid to the Receiver General for the use and benefit of the band or for the use and benefit of any Indian who is entitled to compensation or payment as a result of the exercise of the powers referred to in subsection (1).*

- 5.2 Section 35 creates a two-step process for the authorization of transfers or grants to expropriating authorities. The two steps are processed concurrently. First, consent to the taking or using of reserve lands is given under subsection 35(1) by Order-in-Council. Second, the transfer or grant of reserve lands is authorized under subsection 35(3) by Order-in-Council, or the lands are taken or used under the applicable expropriating legislation under subsection 35(2).

5.3 The provisions of FRPFIA govern the actual transfer or grant of an interest in reserve lands. The FRPFIA creates a mechanism for the conveyance of interests in federal lands. The following provisions are most relevant to section 35 grants or transfers:

2. *In this Act, ... "interest" means*
  - (a) *in relation to land in any province other than Quebec, any estate, right title or interest in or to the land, and includes an easement, a servitude and a lease ...*
4. *Subject to any other Act, no disposition or lease of federal real property or federal immovables shall be made and no licence shall be given in respect of any such property except in accordance with this Act.*
- 5.(1) *Federal real property may be granted and federal immovables may be conceded*
  - (a) *by letters patent under the Great Seal; or*
  - (b) *by an instrument of grant or an act of concession, in a form satisfactory to the Minister of Justice, stating that it has the same force and effect as if it were letters patent.*
- (2) *Federal real property and federal immovables within Canada may, at the discretion of the Minister of Justice, be granted or conceded, as the case may be, by any instrument or act by which, under the laws in force in the province in which the property is situated, real property and immovables may be transferred by a natural person.*
- 11.(1) *An instrument transferring administration and control of federal real property or an act transferring administration and control of federal immovables to Her Majesty in any right other than Canada pursuant to regulations made under paragraph 16(2)(e) shall be signed by the Minister having the administration of the property and countersigned by the Minister of Justice.*
- (2) *A grant, concession, vesting order or other conveyancing instrument or transfer act in favour of Her Majesty in respect of any real property or immovable belonging to Her Majesty in any right other than Canada results, on its acceptance, in Her Majesty having administration and control of the property.*

5.4 The regulations under FRPFIA further provide that:

- 5.(1) *A Minister may transfer to Her Majesty in right of a province, by instrument satisfactory to the Minister of Justice, the administration and control of the entire or any lesser interest of Her Majesty in any federal real property, either in perpetuity or for any lesser term.*
- (2) *A Minister may accept on behalf of Her Majesty a transfer of the administration and control satisfactory to the Minister of Justice of the entire or any lesser interest of Her Majesty in right of a province in any real property, including such transfers made by grant, vesting order or other conveyancing instrument, either in perpetuity or for any lesser term.*

- 11.(1) *The Minister of Justice shall establish and operate a document depository at the Department of Justice that shall contain copies of the following instruments:*
- (a) *grants of federal real property ...*
  - (b) *transfers of administration and control of real property and acceptances of such transfers;*

## 6. Policy

- 6.1 The expropriating authority must obtain First Nation Council's consent before seeking the Governor in Council's consent to the taking or using of reserve lands. The taking or using of reserve lands without First Nation consent must only be sought in exceptional circumstances, with the support of departmental headquarters and the Department of Justice ("DOJ").
- 6.2 The department will not assume an active role in negotiations between the expropriating authority and the First Nation unless requested by the First Nation, and/or a locatee. It is up to the First Nation and the locatees to retain their own expert advisors, including legal counsel. In most cases Canada's role is limited to the administration of the details set out in this Policy. The First Nation and all locatees must obtain independent legal advice whether or not Canada has consented to assist them.
- 6.3 The final **Section 35 Agreement** between the expropriating authority and the First Nation must address, at a minimum, the following points:
- a) **Purpose:** The purpose of the Section 35 Agreement is to clearly articulate the terms agreed to by the First Nation and the expropriating authority.
  - b) **Compensation:** The payment of compensation does not authorize the use or occupation of the lands. Compensation is paid to the Receiver General for Canada to be held in suspense until the Order-in-Council is passed, and the Section 35 Transaction is completed under FRPFIA.
  - c) **Minerals:** Canada retains all rights to mines and minerals and their extraction.
  - d) **Surveys and Land Descriptions:** The expropriating authority must provide a registerable legal description for both Section 35 Lands and any Exchange Lands to be reviewed and approved by the Regional Surveyor, Natural Resources Canada. A CLSR Survey is required. The expropriating authority should assume the survey costs.

- e) **Appraisals:** The expropriating authority must provide an estimate or one or more independent appraisal reports for Section 35 Lands or Exchange Lands depending on the value of the lands. The purpose of the estimate or appraisal report(s) is to confirm the adequacy of the compensation. The estimate or appraisal report(s) must be based on an assessment of the present day Fair Market Value, and may be reviewed by the Real Estate Division of Public Works and Government Services Canada ("PWGSC"). Refer to the "Treasury Board Open and Fair Real Property Transactions Policy" to find the required number and form of reports.
- f) **Environmental Protection:** Where the expropriating authority is a federal entity, either DIAND or the other federal authority must ensure that any environmental requirements under *CEAA* are met. Where the expropriating authority is not a federal entity (i.e. a provincial entity), DIAND must ensure that any environmental requirements under the *CEAA* are met. Where lands are exchanged, DIAND must ensure that an environmental assessment, and any required environmental clean-up, are done on the land that will become reserve land. The expropriating authority will fund the assessment and clean-up. Refer to Chapter 12 of this manual for further details about environmental assessments.
- g) **Individual Interests:** The expropriating authority must negotiate either directly with a locatee or through the First Nation. In those cases where a Section 35 Transfer is contemplated, the expropriating authority must obtain from the locatee(s) an executed form for the "Transfer of Land in an Indian Reserve" pursuant to section 24 of the *Indian Act*.
- h) **Encumbrances:** Any existing surrenders and interests of non-Indian third parties, such as registered leases or permits, must be dealt with to the satisfaction of Canada.

The expropriating authority is responsible for obtaining the consent of lessees or permittees. If the Section 35 Lands are encumbered by a leasehold or permit interest, then, subject to the expropriating authority obtaining the consent of the lessee or permittee, the department may cancel or amend such lease or permit, as the case may be, prior to the Section 35 Transaction. The expropriating authority is responsible for all costs to obtain such cancellation or amendment. DOJ should be consulted in cases where the lessee or the permittee does not provide its consent. If the Section 35 Lands are subject to a surrender (e.g. leasing, merchantable timber, etc.), then Canada may require an amendment or revocation of the surrender prior to processing the Section 35 Transaction. However, some surrenders or designations are not incompatible with, and may make provision for the granting of Section 35 Transfers.



- i) **Interim Use and Occupation:** Without a Section 28(2) or Section 53(1) interim use and occupation permit (see Directive 9-2), the expropriating authority cannot use or occupy the reserve land in question until the Section 35 Transaction is complete.
- 6.4 The department must obtain First Nation consent to the proposed grant or transfer by way of a valid **Band Council Resolution** ("BCR"). Accompanying, but not part of, the BCR must be the appropriate documentation reflected in **Annex C: Federal Requirements List**, which includes the following:
- a) a copy of the Section 35 Agreement between the First Nation and the expropriating authority;
  - b) any applicable executed locatee Section 24 Transfer documents;
  - c) A copy of the estimate or independent appraisal(s) of land value information;
  - d) A copy of the environmental assessment completed by the expropriating authority;
  - e) A copy of the CLSR Survey.
- 6.5 The **BCR** should be accompanied by the documentation referred to in **Annex C: Federal Requirements List**. The BCR must contain the following information:
- a) **Request:** The BCR must include a request that Canada's full interest in the lands be granted or transferred or that an easement be granted or transferred pursuant to section 35 of the *Indian Act*.
  - b) **Compensation:** The BCR must identify separately the total compensation package to be paid to the First Nation and any individual locatees.
  - c) **Locatee Interests (if applicable):** If the Section 35 Transaction deals with Locatee Lands only, then the BCR must specify the split, if any, of the compensation to be paid to the locatee and/or the First Nation.
  - d) **First Nation Support:** The BCR should preferably say whether the proposed grant or transfer has the support of the First Nation membership. If it is a contentious issue among the First Nation members, this should be indicated and details attached.

The BCR should also contain -

- e) **Legal Advice:** The First Nation Council should provide evidence satisfactory to Canada that it has obtained independent legal advice with respect to the execution of the Section 35 Agreement.

## 7. Policy: Individual Land Holders ("locatees")

- 7.1 The Lands Officer will complete a **Land Status Report** (see Annex B) to identify and inform the expropriating authority of any **individual locatee** whom the proposed grant or transfer may affect.
- 7.2 The expropriating authority should conduct all negotiations directly with individual locatees. However, the expropriating authority may also deal with a First Nation Council or the department, where locatees have asked the First Nation, or the department to act for them, and the Band Council or the Department has agreed. See Section 7.5 in respect of the requirement that the locatee obtain a certificate of independent legal advice. In cases of a grant or transfer of the full interest in the land, and not just an easement interest, the expropriating authority should deal with the First Nation Council to negotiate any additional payment designed to compensate the First Nation for the loss of reserve status of those lands.
- 7.3 The expropriating authority must compensate those locatees identified by the Land Status Report as being affected for their loss of the use of the land, in an amount agreed to by the locatee(s), based on an estimate or one or more independent appraisals of the present day Fair Market Value of the Locatee Lands.
- 7.4 Subject to section 6.1, the Lands Officer may not make a recommendation to proceed without the consent of a locatee unless the transaction has the support of the First Nation Council, and all germane locatee objections have been discussed and addressed internally, with the support of DOJ.
- 7.5 Locatee interests must be dealt with in the following manner:
  - a) The individual locatees' interests are to be considered as separate from the interests of the First Nation, for the purposes of compensation.
  - b) In the case of a Section 35 Transfer, upon acceptance of the offered compensation, locatees must execute a form for a Section 24 Transfer, or the executors/administrators of the estate for a Section 49 Transfer.
  - c) Locatees should provide evidence satisfactory to Canada that he or she has obtained independent legal advice.

## 8. Policy: Use of Land before a Section 35 Transaction

- 8.1 In some cases, an expropriating authority has used reserve lands without reaching a final Section 35 Agreement. The expropriating authority may have negotiated an agreement with a First Nation, but this agreement may not meet all the federal requirements for Canada to complete an Order-in-Council submission to the Governor in Council.
- 8.2 If the expropriating authority and the First Nation have never reached a Section 35 Agreement which addresses all the federal requirements, the Lands Officer must take the following steps:
- a) Complete a current **Land Status Report** to determine the current status of the lands and any possibly affected locatees and/or third parties;
  - b) Provide DOJ with the Land Status Report and discuss the outstanding issues as soon as possible;
  - c) In consultation with DOJ, draft a letter to the First Nation and the expropriating authority setting out the current status and substantive facts (including compensation, legal descriptions, the handling of third party interests and other requirements set out in the Federal Requirements List) of the Section 35 Transaction. This letter should clearly identify any outstanding requirements to be actioned by each of the parties to complete the transaction;
  - d) In consultation with DOJ, consider whether further information is required regarding compensation for the Section 35 Lands. The handling of the compensation for an outstanding Section 35 Transaction is often the most difficult issue to resolve. The expropriating authority's position may be that compensation should reflect the date of the "understanding or arrangement" with the First Nation to use the reserve land. However, many factors must be considered, including the fact that pursuant to subsection 28(1) of the *Indian Act*, an *"...agreement of any kind,...by which a band or a member of a band purports to permit a person other than a member of that band to occupy or use a reserve... is void,"* unless authorized by the Minister.

As is often the case in these types of situations, the Lands Officer, with the support of DOJ, must consider these files on a case-by-case basis, but, generally speaking, Canada requires compensation to reflect, at a minimum, the present day Fair Market Value of the lands. Therefore, files may require updates of existing estimates or appraisals to be completed and forwarded to PWGSC for review.

- e) Consider whether the situation warrants an interim use and occupation permit (refer to directive 09-02) until the federal requirements for a Section 35 Transaction have been met.
- 8.3 Sometimes a final Section 35 Agreement between the expropriating authority and the First Nation exists, but no Order-in-Council authorizing the Section 35 Transaction was ever obtained. In these circumstances, the Lands Officer shall:
- a) Complete a current **Land Status Report** to ensure no new encumbrances, interests or locatees have been created since the original Section 35 Agreement;
  - b) Provide DOJ upon request with the **Land Status Report** and confirm that all federal requirements have been addressed;
  - c) Proceed with a Fact Letter to the First Nation and the expropriating authority to ensure the department understands the terms of the Section 35 Agreement, and to clarify any possible issues.
- 8.4 If at any time after a Section 35 Agreement has been entered into the First Nation withdraws its consent to the transaction, DIAND and DOJ should review all the circumstances of the file before deciding whether or not to proceed.

## 9. Process

- 9.1 A brief outline of the Section 35 Transaction process is outlined in **Annex A: The Section 35 Transaction Process**.
- 9.2 Usually the process begins with an expropriating authority looking for a portion of a reserve for a specific purpose (usually highway purposes or other works of public utility), and therefore requesting a Section 35 Transaction for reserve land.
- 9.3 As soon as the Lands Officer is aware that initial discussions are underway between an expropriating authority and a First Nation, the Lands Officer should provide the parties with a current **Land Status Report**.
- a) The completed **Land Status Report** (see Annex B) will identify and inform the expropriating authority of any individual **locatee** or **third party** interests which the proposed Section 35 Transaction may affect.
  - b) The Land Status Report must identify existing registered interests such as locatees, leases, permits or easements, or potential encumbrances such as cardex holdings or surrenders.

- c) The Lands Officer should provide a copy of this Land Status Report, and supporting documentation to the expropriating authority and the First Nation as soon as possible.

9.4 The following section provides a detailed overview of the process, the major issues, and the steps the Lands Officer, in consultation with PWGSC and DOJ, must address prior to completing a Section 35 Transaction:

#### 9.4.1 **Confirm Authority and Title**

- a) The Lands Officer completes a Land Status Report to review the legal status of the lands which are subject to a particular Section 35 Transaction.
- b) The Lands Officer's Land Status Report should include those lands which are to be granted or transferred to the expropriating authority to determine any encumbrances and/or interests, as well as identification of former reserve lands which the expropriating authority may be transferring to Canada, and whether or not any reversionary interests may be applicable to lands to be transferred to Canada.
- c) The Lands Officer must confirm with the expropriating authority that it has the power to expropriate land for the stated purpose. The expropriating authority should also be asked to confirm the nature and extent of its statutory expropriation power, the purpose of the Section 35 Transaction, the area and location of the land proposed to be granted or transferred, and the reasons why the interest sought is necessary for its purposes rather than a lesser interest. (See section 4.4 above.)
- d) The expropriating authority must provide to the Lands Officer evidence of title satisfactory to Canada to all lands bordering the Section 35 Lands which the expropriating authority claims to hold, and to all lands which the expropriating authority wishes to transfer to Canada.

#### 9.4.2 **Surveys**

- a) All applicable surveys for a Section 35 Transaction are paid for by the expropriating authority;
- b) Canada requires all surveys to be Official Plans or CLSR Surveys;
- c) The expropriating authority must obtain survey instructions from Natural Resources Canada. To obtain instructions, the expropriating authority must obtain evidence of permission from the First Nation consenting to a survey of reserve land and allowing the surveyor on the reserve and a Land Status Report from the Lands Officer.

**Surveys (continued)**

- d) The Lands Officer should ensure that provisional survey plans identify each parcel that will be affected by the Section 35 Transaction, including remainders of Locatee Lands, and clearly define which lands are presently held by the expropriating authority and which lands are subject to the proposed transaction. These parcels should be clearly defined in the CLSR Survey book of reference.
- e) The Lands Officer should also review provisional survey plans against any applicable draft drawing or plans to verify encumbrances and possible variances.
- f) Natural Resources Canada will write the legal descriptions for the Section 35 Transaction once the CLSR Survey has been approved (to be used as the description in the Order-in-Council and the FRPFIA documents).

**NOTE:**

Of all the requirements for a Section 35 Transaction, a survey can take the longest to complete. Therefore, for pending transactions, pressing for completion of an outstanding survey or a survey that requires amendment should be one of the first priorities in terms of moving the file forward towards completion.

**9.4.3 Encumbrances**

- a) The expropriating authority should obtain the consent of any affected third parties, such as lessees or permittees, if amendments or cancellations of these interests are required. DOJ should be consulted in cases where the lessee or the permittee is not willing to provide its consent.
- b) The expropriating authority is responsible for all costs to obtain such cancellation or amendment.
- c) If the Section 35 Lands are encumbered by a leasehold or permit interest, then, subject to the expropriating authority obtaining the consent of the lessee or permittee, the Lands Officer may cancel or amend such lease or permit, as the case may be, prior to the Section 35 Transaction.
- d) If the Section 35 Lands are subject to a surrender (e.g. leasing, merchantable timber, etc.), then Canada may require an amendment or revocation of the surrender prior to processing the Section 35 Transaction, however, some surrenders or designations are not incompatible with, and may make provision for the granting of Section 35 Transfers.

#### 9.4.4 Environmental Compliance

- a) Under the *Canadian Environmental Assessment Act*, ("CEAA") environmental assessments are carried out as early as practicable in the planning stages of a project.
- b) The Lands Officer must ensure that the proposed Section 35 Transaction is subjected to an environmental assessment, which the expropriating authority funds. Based on the assessment, the departmental Environmental Specialist completes an environmental screening report. Where lands are exchanged, an environmental clean-up, if required, must be done by the expropriating authority on the land that is proposed to become reserve land. The addition to reserve of any Exchange Lands is subject to the Additions to Reserves/New Reserves Policy and the prerogative of the Crown and the department can provide no guarantee to the First Nation that Exchange Lands will become reserve. See Chapter 12 of this manual for further information on environmental assessments and Chapter 10 for further information on additions to reserve.
- c) Upon receipt of appropriate environmental reports from the expropriating authority, the Lands Officer should provide the reports to the departmental Environmental Specialist for review, comments and a CEAA Screening Decision.

#### 9.4.5 Locatee Interests

- a) The Lands Officer must complete a thorough Land Status Report with respect to any affected Locatee Lands.
- b) A locatee's interests are to be considered as separate from the interests of the First Nation, for the purposes of compensation.
- c) Surveys of any proposed Section 35 Lands must adequately deal with Locatee Lands to ensure proper updates of title. This includes, among other things, the proper surveys of cardex holdings, proper subdivisions of existing parcels, and adequate descriptions of parcels separating band lands from Locatee Lands. The Lands Officer should liaise with Natural Resources Canada with respect to these issues.
- d) The expropriating authority negotiates with the First Nation Council on band lands and directly with applicable locatees on those lands held by Certificate of Possession. The expropriating authority needs to obtain the consent of the locatees with respect to the proposed grant or transfer of Locatee Lands and the consent of the First Nation Council since the First Nation is affected by the proposed grant or transfer of Locatee Lands.

**Locatee Interests (continued)**

- e) In some cases, locatees and a First Nation agree to a percentage split of compensation for Locatee Lands (e.g., 90% for the locatee and 10% for the First Nation). This may be more prominent where a transaction involves only Locatee Lands, and no band land at all. In the normal case, the share for the Locatee should be at least Fair Market Value. However, the department is not a party to these negotiations and, therefore, the Lands Officer should not promote or discourage these internal First Nation decisions.
- f) Upon acceptance of the offered compensation for a Section 35 Transfer, locatees must execute a form for a Section 24 Transfer, or the executors/administrators of the estate for a Section 49 Transfer, pursuant to the *Indian Act*. (Note: a Section 24 or Section 49 Transfer is not required for a Section 35 Easement.)
- g) The executed form for a Section 24 Transfer must be attached to the Section 35 Agreement and the BCR requesting the Section 35 Transfer.
- h) Upon receipt of the Order-in-Council authorizing the Section 35 Transfer, the Lands Officer should have the executed form for the Section 24 or Section 49 Transfer approved by the Minister's delegated authority authorized by the *Delegation of Authority Under the Indian Act and Regulations* (refer to the relevant regional delegation instrument).
- i) Upon the completion of the FRPFIA grant or transfer of the land to the expropriating authority, the approved Section 24 or Section 49 Transfer should then be registered in the Indian Lands Registry.
- j) The Registrar of the Indian Lands Registry will then issue a new Certificate of Possession for the remaining lands held by the locatee.

**9.4.6 Appraisals**

- a) Every Section 35 Transaction requires at least one estimate or independent appraisal for Section 35 Lands or Exchange Lands, based on Treasury Board policies, and paid for by the expropriating authority. The estimate or appraisal(s) must be based on terms of reference approved by PWGSC, and must reflect the present day Fair Market Value of the lands.



**Appraisals (continued)**

- b) Upon receipt of the estimate or appraisal(s), the Lands Officer's Manager must (except in regions where there are other practices) forward a copy to PWGSC for review, to determine if the proposed compensation is fair and reasonable. Part of the determination of whether the proposed compensation is fair and reasonable will involve a determination of whether it includes reasonable compensation for loss of reserve status for any land for which a full interest is proposed to be granted or transferred and for which the expropriating authority is providing no equivalent Exchange Lands that might be eligible for reserve status.
- c) If the estimate or appraisal(s) is/are not current, ie. more than one year old, case by case decisions must be made by departmental management, PWGSC, and DOJ on how to proceed.

**9.4.7 Compensation**

- a) As early as possible in the discussions regarding a proposed Section 35 Transaction, the Lands Officer should notify the expropriating authority that the compensation is to be paid to the Receiver General for Canada, and not paid directly to a First Nation Council or locatees.
- b) Canada must be satisfied that the compensation for a Section 35 Transaction is fair and reasonable. In most cases, that means ensuring that at least present day Fair Market Value is paid for the Section 35 Transaction.
- c) Canada requires that compensation for Section 35 Lands be paid to the Receiver General for Canada prior to the passing of the Section 35 Order-in-Council. It is recommended that the Lands Officer receive the compensation at the Fact Letter stage, and deposit it into a departmental suspense account prior to processing an Order-in-Council submission.

**9.4.8 Interim Use and Occupation Permit**

- a) Although rarely allowed, the expropriating authority may request the issuance of a permit authorizing interim use and occupation of the Section 35 Lands in those cases where there is a **demonstrated urgency**. See Directive 9-2 for further information.

#### 9.4.9 Section 35 Agreement & BCR

- a) Once all required information has been obtained, the expropriating authority finalizes the negotiations and completes a final Section 35 Agreement with the First Nation and/or applicable locatees. While Canada is not a party to the Agreement, Canada requires that the Agreement include the terms on which the expropriating authority is requesting the Section 35 Transaction and the information included in the standard legal and policy requirements of Canada as set out in Annex C: Federal Requirements List, as confirmation that these matters have been considered and addressed by the parties to the Agreement. The Section 35 Agreement may also include terms that have been agreed to among the First Nation, the locatees and the expropriating authority but which are not part of the request for a Section 35 Transaction. The Agreement, or other written assurances satisfactory to Canada, should specify which terms are not part of the request for a Section 35 Transaction. The expropriating authority then delivers this Section 35 Agreement to DIAND for review and processing.
- b) The Lands Officer reviews the Section 35 Agreement and supporting documents to ensure that the information and documents required under the standard legal and policy requirements have been provided (see **Annex C: Federal Requirements List**).
- c) The First Nation's consent to the proposed Section 35 Transaction and Section 35 Agreement should be obtained to confirm that the First Nation has been consulted by the expropriating authority with respect to the proposed Section 35 Transaction and matters of concern to the First Nation. This consent must be obtained by way of a valid BCR. The BCR will confirm the terms of the Section 35 Agreement and provide the consent to the Section 35 Transaction and the allocation of compensation as between the First Nation and the locatees as set out in paragraph 6.5 of this Directive. If requested, the Lands Officer, with the support of DOJ, can provide the First Nation with sample wording for the BCR.
- d) The completed documentation (i.e. the Section 35 Agreement, the BCR, and supporting documentation) is forwarded to DOJ for review. Justice will identify and assist in the resolution of any outstanding legal issues.

- e) The Lands Officer should suggest to the expropriating authority that the Section 35 Agreement contain clauses that:
  - i) allow for amendment to such agreement to be made by way of confirmation of the Fact Letter by both the First Nation, by way of BCR, and the expropriating authority; and provide that,
  - ii) if there is an inconsistency between the Section 35 Agreement and the Fact Letter, the Fact Letter will govern.

#### 9.4.10 **Fact Letter**

- a) Upon review of the Section 35 Agreement between the expropriating authority and the First Nation, the Lands Officer drafts a Fact Letter.
- b) The Fact Letter should include:
  - 1) the nature of the transaction agreed to by the parties, ie. either a transfer or grant of Canada's full interest or an easement interest;
  - 2) that the interest will be transferred or granted by Canada to the expropriating authority for a specific public purpose and will be returned to Canada should that use cease; and
  - 3) that lands where the full interest has been granted or transferred by Canada which are returned to Canada will not have reserve status, and any proposal by the First Nation for reserve status for any returned lands will be subject to the Crown's royal prerogative, and Canada's policies on reserve creation or additions to reserve in effect upon the date of such proposal.
- c) The Lands Officer should provide opportunity for the expropriating authority and the First Nation to comment on the Fact Letter. There may be circumstances or Regions where this will have to be a confirmation by the expropriating authority and the First Nation that the Fact Letter reflects the agreement between those parties.

**9.4.11 Order-in-Council Submission**

- a) The Lands Officer, with the support of DOJ then drafts the Order-in-Council submission (commonly referred to as the Red Jacket).
- b) DOJ reviews the Red Jacket as to form and content, and provides the Lands Officer with a letter confirming its approval, or setting out its concerns.
- c) The Lands Officer then sends the completed Order-in-Council submission to departmental headquarters for the recommendation of the Minister, and the authorization of the Governor in Council.

**9.4.12 Federal Real Property and Federal Immovables Act Document**

- a) Once the Order-in-Council has been passed by the Governor in Council, it is returned to the regional office.
- b) DOJ or the Region will prepare four (4) original documents relating to the land interest under FRPFIA to be approved by the delegated authority authorized to grant or transfer federal lands. (Refer to the "Treasury Board Real Property Transactions Processes and Authorities Policy").
- c) The FRPFIA documents are forwarded to DOJ for countersignature.
- d) This step completes the process for Section 35 Transactions.

**9.4.13 Registration**

- a) The Lands Officer then sends an original of the Order-in-Council, the Section 24 or Section 49 Transfers, if any, and an original of the FRPFIA documents to the Indian Lands Registry for registration.
- b) DOJ will send a copy of the FRPFIA documents to the Federal Real Property Document Depository.
- c) A copy of the executed FRPFIA documents together with the Orders-in-Council are then distributed by the Lands Officer to the expropriating authority, the First Nation, Natural Resources Canada and locatees, and notices provided to the affected third parties.

#### 9.4.14 Release of Section 35 Compensation

- a) Once the Order-in-Council is passed and the FRPFIA documents are executed by the appropriate delegated authority and countersigned by DOJ, the compensation can be released by the Lands Officer as follows:

##### For band land:

- a) the principal of the monies which are compensation for band land (not locatee land) must be deposited to the First Nation's **Capital Account**;
- b) any accrued **interest** on these monies is paid to the First Nation's **Revenue Account**.

##### For locatee land:

In the case of a locatee, the department may pay the locatee directly from the departmental suspense account, all monies - **principal** and accrued **interest** - to which the locatee is entitled, pursuant to Section 35(4) of the Indian Act.

- 9.5 **Additions to Reserve:** Where a land exchange is proposed as part of the compensation, the additions to reserve policy as set out in Chapter 10 should be initiated concurrent with the Section 35. The department has precedent OIC documents for use in this exchange situation. The Crown can not guarantee that lands proposed in exchange will be eligible for or be granted reserve status.

## 10. References

- 10.1 Besides the *Indian Act*, you may want to consult:

- a) *Indian Lands Registration Manual*
- b) *Manual for the Administration of Band Moneys*
- c) The Real Property Management section of the Treasury Board Manual. The INTERNET URL is: [www.tbs-sct.gc.ca/pubpol\\_e.html](http://www.tbs-sct.gc.ca/pubpol_e.html)
- d) Any Federal/Provincial Protocol specific to roads

## **Chapter 9**

### **Directive 9-1: Transactions Under Section 35**

#### **Annex A: Section 35 Transaction Process**



## Annex A

### Section 35 Transaction Process

Generally speaking, here is how a Section 35 Transaction usually unfolds:

1. The expropriating authority wants a portion of a reserve for a specific purpose (usually highway purposes or other works of public utility), and therefore requests a Section 35 Transaction of federal reserve land.
2. The expropriating authority initiates discussions and negotiates a Section 35 Agreement with the First Nation and/or applicable locatees, addressing:
  - (1) Title
  - (2) Surveys
  - (3) Encumbrances
  - (4) Environmental Assessments
  - (5) Locatee Interests
  - (6) Appraisals
  - (7) Compensation.
3. The expropriating authority delivers a Section 35 Agreement to DIAND for review and processing.
4. The First Nation provides to Canada a BCR which consents to the proposed Section 35 Transaction, the Section 35 Agreement, the compensation and, where necessary, the allocation of the compensation between the First Nation and the locatees and directs Canada to pay the locatees from the compensation provided by the expropriating authority.
5. Canada (DIAND, DOJ & PWGSC) reviews the Section 35 Agreement and BCR to ensure legal and policy requirements have been met.
6. DIAND completes federal requirements which include:
  - (1) Land Status Report
  - (2) Environmental Screening
  - (3) Appraisal Review
  - (4) Compensation Review
  - (5) Applicable Interim Use and Occupation Permits
  - (6) Federal Fact Letter



- (7) Order-in-Council which authorizes the transaction to the expropriating authority
  - (8) Federal Real Property and Federal Immovables Act (FRPFIA) grant or transfer.
7. The Order-in-Council is effected by a FRPFIA grant or transfer executed by DIAND or PWGSC and countersigned by DOJ once the federal Order-in-Council is passed.
8. Compensation is paid to the First Nation and/or applicable locatee.
9. The Order-in-Council, any Section 24 or Section 49 Transfers, and FRPFIA documents are registered in the Indian Lands Registry.
10. FRPFIA documents are also registered in Federal Document Depository.
11. Copies of documentation are provided to the expropriating authority and First Nation.

## **Chapter 9**

### **Directive 9-1: Transactions Under Section 35**

#### **Annex B: Sample Land Status Report**



## Annex B LAND STATUS REPORT

<b>Reserve Name:</b> _____ <b>No.:</b> ____ <b>First Nation:</b> _____
--

<p><b>Proposed Purpose</b> (check box):</p> <table style="width: 100%; border: none;"> <tr> <td style="width: 50%; vertical-align: top;"> <input type="checkbox"/> Band land Lease  <input type="checkbox"/> Locatee land Lease  <input type="checkbox"/> Easement   <input type="checkbox"/> Other: (specify) _____         </td> <td style="width: 50%; vertical-align: top;"> <input type="checkbox"/> Permit  <input type="checkbox"/> Designation  <input type="checkbox"/> Section 35 Transfer         </td> </tr> </table>	<input type="checkbox"/> Band land Lease <input type="checkbox"/> Locatee land Lease <input type="checkbox"/> Easement  <input type="checkbox"/> Other: (specify) _____	<input type="checkbox"/> Permit <input type="checkbox"/> Designation <input type="checkbox"/> Section 35 Transfer
<input type="checkbox"/> Band land Lease <input type="checkbox"/> Locatee land Lease <input type="checkbox"/> Easement  <input type="checkbox"/> Other: (specify) _____	<input type="checkbox"/> Permit <input type="checkbox"/> Designation <input type="checkbox"/> Section 35 Transfer	

<p><b>Status of Land</b> (check box or boxes if the lands described below cover more than one type of land):</p> <input type="checkbox"/> Band Land (not designated or Surrendered); or, <input type="checkbox"/> Designated Land; or Locatee Land.
---

<p><b>Legal Description</b> (attach copy of plan and/or NRCAN letter of description to Land Status Report):</p> <p>Lands: Lot _____ Block _____ Plan No. _____ (R/CLSR)</p> <p>Textual Description: _____</p> <p>_____</p> <p>_____</p> <p>_____</p>
--

If **Designated or Surrendered Land**, Complete the following (attach copy of designation or surrender to Land Status Report):

Number Order-in-Council: P.C \_\_\_\_\_ - \_\_\_\_\_

Date of Order-in-Council: \_\_\_\_\_ (Month/day/year)

Term or Period of Designation or Surrender: From \_\_\_\_\_ (m/d/y) To \_\_\_\_\_  
 \_\_\_ (m/d/y)

Purpose(s) of Designation or Surrender: \_\_\_\_\_  
 \_\_\_\_\_  
 \_\_\_\_\_  
 \_\_\_\_\_

If **Locatee Land**, Complete the following:

Locatee: \_\_\_\_\_  
 Last name First name Band No.

Address: \_\_\_\_\_  
 Street City Postal Code

Locatee's phone no.: \_\_\_\_\_ (h) \_\_\_\_\_ (w) \_\_\_\_\_ (cell)

Lawfully Held by: (attach copy of documentation, including *Parcel Abstract* to Land Status Report): (check box)

**9** CP - ILR Registration No: \_\_\_\_\_ ; or,  
**9** NE - ILR Registration No: \_\_\_\_\_ ; or,  
**9** NETI - ILR Registration No: \_\_\_\_\_ ; or,  
**9** Cardex - ILR Registration No: \_\_\_\_\_ ; or,









**Chapter 9**

**Directive 9-1: Transactions Under Section 35**

**Annex C: Federal Requirements List**



## Annex C

### Federal Requirements List

#### Requirements of Canada for Section 35 Transactions:

1. The First Nation and expropriating authority must enter into an agreement with respect to a proposed Section 35 Transaction, (the "Section 35 Agreement").
2. The First Nation, by BCR, must formally accept the terms and conditions of the Section 35 Agreement and request that Canada grant a full interest or an easement or transfer administration and control of a full interest or of an easement in the lands to the expropriating authority.
3. The expropriating authority must submit a request in writing to take the lands pursuant to subsection 35(1) of the *Indian Act* and that, in lieu of such taking, Canada grant or transfer the lands pursuant to subsection 35(3) of the *Indian Act* and FRPFIA.
4. Evidence satisfactory to Canada must be provided to Canada of a justification for the type of tenure requested for any lands being granted or transferred by Canada to the expropriating authority and of the expropriating authority's statutory power to expropriate same.
5. All lands must be legally described by a CLSR Survey, in accordance with the requirements of Natural Resources Canada.
6. The Section 35 Agreement shall set out the legal description of the lands and any lands forming part of the compensation package.
7. In order to comply with subsection 35(4) of the *Indian Act*, monies paid solely as consideration for the Section 35 Transaction must be deposited in favour of the Receiver General for Canada for the use and benefit of the First Nation or any locatee who is entitled to compensation or payment. In implementing this legislative requirement the Section 35 Agreement should stipulate the compensation being provided for the lands (whether that compensation is in the form of money, land or other gratuity such as employment opportunities or material works), and Canada must satisfy itself as to the adequacy of the compensation.

*(The monies may be held by legal counsel for the First Nation or a locatee, as the case may be, before the monies are paid to Canada, but the Lands Officer should not recommend the Section 35 Transaction proceed to departmental headquarters prior to receipt of the monies in favour of the Receiver General. At the latest, the monies should be paid to the Receiver General upon confirmation of a Fact Letter, by the First Nation and the expropriating authority. Canada would like First Nations to be aware that it is usual for monies held by it in suspense to earn a higher rate of interest than monies held by legal counsel in a trust account.)*

8. If a locatee is in possession of any portion of the Section 35 Lands and the proposed Section 35 Transaction is the grant or transfer of a full interest in the lands, then the expropriating authority must obtain from the locatee an executed form for the "Transfer of Land in an Indian Reserve" pursuant to Section 24, or if the locatee is deceased, the executor or administrator transfer pursuant to Section 49 of the *Indian Act*.
9. If one or more locatees are involved, the First Nation must stipulate if and how the compensation is to be divided between the First Nation and the locatee(s) and direct Canada to pay the locatees directly from the compensation provided by the expropriating authority.
10. Evidence satisfactory to Canada must be provided to Canada of the value of any lands being transferred to Canada for the use and benefit of the First Nation and any lands being granted or transferred by Canada to the expropriating authority.

*(Although the amount of compensation provided by the expropriating authority for the lands is a matter to be negotiated between the expropriating authority and the First Nation, Canada must satisfy itself that adequate compensation has been provided for the lands. The First Nation should keep in mind during its negotiations the value of any merchantable timber or topsoil located on the lands and the loss to the First Nation of the value of the reserve status that is being lost in respect of land in which a full interest is intended to be granted or transferred.)*

11. The Section 35 Agreement must acknowledge in writing that any costs incurred in construction or otherwise by the expropriating authority, or on its behalf, prior to the grant or transfer of the lands, are incurred at its own risk, unless previously agreed to otherwise in an interim use permit or in some other agreement in writing with the First Nation and Canada.

12. The expropriating authority must acknowledge in the Section 35 Agreement that, unless otherwise agreed to in writing, it is solely responsible for any surveys, appraisals, and environmental assessments or audits.
13. The Section 35 Agreement must confirm that the expropriating authority shall transfer any Exchange Lands and reversionary lands to Canada.
14. The expropriating authority must comply with all environmental laws, regulations and policies of Canada in order for Canada to accept the transfer of the Exchange Lands and reversionary lands.
15. In order for the Minister to comply with the *Canadian Environmental Assessment Act*, the expropriating authority must provide the required documentation to the satisfaction of Canada for the project to be constructed on the lands.
16. The First Nation should provide evidence satisfactory to Canada that it has obtained independent legal advice with respect to the execution of the Section 35 Agreement.
17. Locatees, or executors/administrators whose land is affected should provide evidence satisfactory to Canada that they have obtained independent legal advice with respect to the execution of the Section 35 Agreement and the Section 24 or Section 49 Transfer.
18. All encumbrances on the Section 35 Lands and any lands being transferred to Canada must be dealt with to the satisfaction of Canada.

# Directive 9-2

## Interim Use and Occupation

### 1. Purpose

- 1.1 This directive describes when and how to issue an interim use and occupation permit pursuant to subsection 28(2) of the *Indian Act*, or, in some cases, pursuant to subsection 53(1) of the *Indian Act*, before an expropriating authority takes lands under section 35.

### 2. General

#### 2.1 What is an interim use and occupation permit?

- a) An interim use and occupation permit allows the expropriating authority to use and occupy reserve lands to carry out construction before those lands have been granted or transferred to the expropriating authority according to Section 35.
- b) The interim use and occupation permit authorizes the expropriating authority to go on specified reserve lands for a certain purpose. However, it must not give the expropriating authority any interest in reserve lands. This permit does not grant exclusive use or occupation and it must not be assignable to third parties.

#### 2.2 When are interim use and occupation permits used?

- a) The general rule is that an expropriating authority **cannot** use or occupy reserve lands until the issuance of an Order-in-Council authorizing the Section 35 Transaction, and the actual grant or transfer of the land to the expropriating authority pursuant to FRPFIA.
- b) However, construction may be authorized prior to the FRPFIA grant or transfer where there is a **demonstrated urgency**. In most cases, this urgency would be related to public health and safety issues, such as a washed out road due to flooding, or other natural disasters.

- c) It is the expropriating authority's responsibility to demonstrate to Canada that the situation is exceptional.
- 2.3 Refer to Chapter 06 for further information on the drafting, issuing and cancelling of permits generally.

### 3. Authorities

- 3.1 If the lands are not designated lands, the authority for issuing an interim use and occupation permit is subsection 28(2) of the *Indian Act*, which states that:

*28(2) The Minister may by permit in writing authorize any person for a period not exceeding one year, or with the consent of the council of the band for any longer period, to occupy or use a reserve or to reside or otherwise exercise rights on a reserve.*

If the lands are designated lands, the terms of the designation may, in some cases, allow the Minister to enter into permits. In such cases, the authority for issuing an interim use and occupation permit is the designation and paragraph 53(1)(b) of the *Indian Act*, which states that:

*53(1) The Minister or a person appointed by the Minister for the purpose may, in accordance with this Act and the terms of the absolute surrender or designation, as the case may be,*

*(a) ...*

*(b) manage, lease or carry out any other transaction affecting designated lands.*

The terms of the designation must be carefully examined in each case to ensure that it allows the issuance of an interim use and occupation permit for the purposes set out in the permit.

### 4. Policy

- 4.1 **As previously stated, an interim use and occupation permit is only appropriate in exceptional circumstances.** For example, a permit for interim use and occupation may be issued where, for legitimate reasons, construction cannot be delayed until the Order-in-Council is issued. In most cases, this urgency would be related to construction windows involving fish bearing streams, or obvious circumstances, such as a washed out road due to flooding, or other natural disasters.

- 4.2 Unless there are potential public health and safety concerns, an interim use and occupation permit will only be authorized after the expropriating authority and the First Nation have entered into a Section 35 Agreement setting out the terms and conditions of the Section 35 Transaction. For more details on the content of the Section 35 Agreement refer to Directive 09-01, paragraph 6.3.

**NOTE:**

It should be anticipated that in some circumstances, all the federal requirements of a Section 35 Agreement, such as a CLSR Survey, may not be completed at the time of the requirement of the permit.

- 4.3 See Chapter 6 for the policy applicable to subsection 28(2) permits generally. In addition, an interim use and occupation permit must address the following points:
- a) **Term:** In most cases the permit should be issued for a term not to exceed one year or such greater length of time as is required to complete the proposed construction and prepare the appropriate survey plan.
  - b) **Termination:** The permit should cease upon completion of the Section 35 Transaction and may be terminated at any time prior to the completion of the transaction, at the discretion of the Minister.
  - c) **Compensation:** Normally, as with most instruments, a permit requires at least one estimate and/or independent appraisal, and the permit fee must reflect the present day Fair Market Value of the lands. Deviations from this policy, such as a nominal permit fee, should be discussed with DOJ.
  - d) **Subsection 35(3):** The expropriating authority must acknowledge that the issuance of the permit is not to be construed as implying any right to the granting of an Order-in-Council pursuant to subsection 35(3) of the *Indian Act*. The permit should state that the department will not submit a recommendation to the Governor in Council for a final order authorizing the grant or transfer of the lands in question to the expropriating authority until a plan of survey is registered and all of the conditions set forth in the authorizing BCR have been met.
  - e) **Engineering design plans:** These should be incorporated in the permit.



- 4.4 The consent of the First Nation Council to the Section 28(2) interim use and occupation permit must be obtained in the form of a Band Council Resolution ("BCR"), which must, at a minimum, include the following terms:
- a) **Term:** The term must be specified.
  - b) **Land Description:** Where the term is for more than one year, the permit area should be identified by reference to an acceptable survey plan.
  - c) **Individual Locatees:** The BCR should confirm that any individual interests affected by the proposed use have been dealt with.
  - d) **Proposed Use:** This should be clearly identified in the BCR.
  - e) **Compensation:** The permit fee must be specified.
  - f) **Request for Permit:** The BCR must contain an express request that the Minister issue a permit pursuant to subsection 28(2) of the *Indian Act*, or, if applicable, pursuant to subsection 53(1) of the *Indian Act* and the associated designation.
  - g) **Agreement:** The executed Section 35 Agreement between the First Nation and the expropriating authority must be attached to the BCR.
  - h) **Permit:** Attach the draft permit to the BCR.

## 5. Process

- 5.1 Before initiating the permit process, the following procedural steps must be completed:
- a) **Section 35 Agreement:** The expropriating authority and the First Nation council must negotiate a Section 35 Agreement incorporating the terms and conditions upon which the lands will be transferred pursuant to section 35.
  - b) **Review of Agreement:** The Section 35 Agreement must be reviewed by the Lands Officer and DOJ.

- c) **Obtain BCR:** The First Nation Council must pass a BCR requesting that the Minister issue an interim use and occupation permit pursuant to subsection 28(2), or, if applicable, pursuant to subsection 53(1) and the associated designation.
- 5.2 Once these preconditions have been met, the procedure for obtaining an interim use and occupation permit is the same as that which is set out in Chapter 06, which contains a detailed process for the issuance of subsection 28(2) permits.

## 6. References

- 6.1 In addition to the *Indian Act*, you may want to consult:
- a) Indian Lands Registration Manual
  - b) The Real Property Management section of the *Treasury Board Manual*.  
The INTERNET URL is: [www.tbs-sct.gc.ca/pubpol\\_e.html](http://www.tbs-sct.gc.ca/pubpol_e.html)

## INDEX TO CHAPTER 10 ADDITIONS TO RESERVE

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# Directive 10 - 1

## Additions to Reserves / New Reserves

### 1. Introduction

- 1.1 As part of the Federal Government's *Gathering Strength* response to the Royal Commission on Aboriginal Peoples (RCAP), the Lands and Trust Services (LTS) sector of Indian and Northern Affairs Canada (INAC) is working with the Assembly of First Nations (AFN) to review its business lines under the AFN/INAC Joint Initiative for Policy Development (the Joint Initiative). The Joint Initiative identified the 1991 Additions to Reserves/New Reserves (ATR) policy as an early priority under its work plan.
- 1.2 First Nations who participated in national ATR focus groups and regional involvement processes have identified a number of First Nation needs, including objectives that could be achieved in the short-term, as well as those that could be worked on in the future. Therefore, like all the Joint Initiative reviews, options for ATR are being structured in three stages; short-term improvements, medium-term transitional and long-term fundamental changes. Since it was a First Nations' priority, the substantive work on ATR under the Joint Initiative began well ahead of the other business lines being reviewed. As a result, the first Joint Initiative report to the AFN Annual General Assembly and INAC in 1999 recommended that short-term operational changes be made to facilitate the processing of more "straightforward (ATR) policy proposals" and that "INAC officials pursue the steps necessary to secure these changes through the INAC and Government of Canada approval mechanisms".
- 1.3 As a result, an ATR Joint Initiative Working Group was formed in the fall of 1999 to pursue these short-term improvements, while preparing policy options for longer term review. The result was two products. The first product is a short-term package, which includes this policy directive, along with a First Nations' ATR communications toolkit and process mapping improvements. These initiatives all seek to enhance First Nations' involvement in the ATR process. The second product is an ATR Discussion Paper on potential future policy directions prepared for initial First Nations' comments at the Joint Initiative National Gathering in Winnipeg in June 2000.

- 1.4 In keeping with the mandate for short-term improvement received in 1999, the objectives of this policy directive are to:
- a) clarify the existing (1991) ATR policy, as embodied in INAC's Land Management Manual, since the 1991 ATR policy, as written, was not viewed as setting out clear policy statements in a number of key areas and has therefore been subject to different interpretations; and,
  - b) clarify where the policy and practice should facilitate and allow for more routine reserve addition proposals, instead of the "one size fits all" approach in the 1991 policy for handling both routine and complicated proposals.
- 1.5 It should be noted that this directive does not change the basic, underlying framework of the 1991 policy or create new policy precedents. The reason for not changing the basic policy structure is that there is no mandate from INAC or the AFN at this point in time, due to the need for further consultations before such a mandate can be provided. Rather, this directive is intended to clarify the current policy to achieve consistent interpretation and implementation across the country, in accordance with the above short-term objectives.
- 1.6 As a result, this directive contains both the short-term improvements First Nations asked for (as directed by the AGA in July 1999) and the remaining elements of the 1991 policy (largely with respect to the treatment of new reserves - see Section E and Annex C). Full scale policy consultations on the remaining elements of the 1991 ATR policy which are not changed by this directive may evolve over the longer term as the Joint Initiative continues its work. Such consultations would need to involve a broader audience of both First Nations and third parties.
- 1.7 As noted above, the short-term improvements found in this directive were based on the views of First Nations expressed at national ATR focus groups. It also benefited from subsequent technical input from First Nation ATR practitioners in some regions (whose views were solicited by AFN Regional Coordinators and regional INAC officials) and from First Nation, provincial and municipal government representatives who attended national workshops on communications and process improvements in the area of ATR. The short-term improvements found in this directive also reflect a large number of the recommendations from First Nation participants at the Joint Initiative National Gathering in June 2000, e.g., with respect to community additions and the need to expand reserves for economic development purposes.



- 1.8 Since the environment policy with respect to ATR was not considered to require any significant revision at this time, it is not included in this policy directive. Therefore, references to environmental practices in each Annex contained in this directive must be read in conjunction with Chapter 12 of INAC's Land Management Manual, as amended from time to time.

## 2. Authorities

- 2.1 There is no statutory authority under the *Indian Act* or any other federal legislation to set aside land as a reserve. Instead, lands are granted reserve status by federal Order in Council (OIC) pursuant to the Royal Prerogative, exercised by the Governor in Council, which is a non-statutory authority.
- 2.2 The *Federal Real Property Act* and its regulations apply to the transfer of land into federal title, outlining relevant authorities and requirements governing this stage of the process. This legislation, however, does not deal with the actual granting of reserve status to land.
- 2.3 Before seeking reserve status from the Governor in Council, or Minister under Bill C-14 and other proposed Claims Implementation legislation, either the Regional Director General (RDG) or Deputy Minister (DM) must first grant an Approval in Principle (AIP) to a proposal. An AIP itself represents INAC's decision to recommend a proposal to the Minister for consideration of reserve status through a submission to the Governor in Council, or a Ministerial Order under the above-mentioned Claims legislation. An AIP can be granted with or without conditions, since land purchases and other steps may have to be subsequently completed before a final recommendation for OIC is made.
- 2.4 RDG's have delegated AIP authority for all Legal Obligations, and Community Additions proposals which meet the ATR policy and site specific criteria for those categories outlined in this directive. New Reserve/Other Policy proposals are not delegated to RDGs for AIP. Any New Reserve/Other Policy proposals which RDGs are prepared to recommend, require Deputy Minister (DM) AIP.
- 2.5 This policy directive is issued under the authority of the Minister, HQ INAC, and is effective as of **September 27, 2001**.
- 2.6 It forms part of INAC's *Land Management Manual*, Chapter 10, Additions to Reserves; and replaces Part 1, Sections 9.1 to 9.49 inclusive of the Additions to Reserves policy dated November, 1991 (previously Chapter 9, INAC's Land Management Manual.)
- 2.7 For this directive, references to environmental practices in each Annex must be read in conjunction with Chapter 12 of INAC's Land Management Manual, as amended from time to time, which remains in effect.

### 3. Definitions

- 3.1 "ATR" is a short-form generic term referring to proposals for additions to reserve or new reserves.
- 3.2 "Addition to reserve" or "reserve addition" means a proposal for the granting of reserve status to land which is within the service area of an existing reserve community (see definition of "service area" below);
- 3.3 "New reserve" means the granting of reserve status to land which is not within the "service area" of an existing reserve community;
- 3.4 "Reserve community" means the locality where the First Nation members reside on a reserve, comprised of physical infrastructure, community services and installations;
- 3.5 "Service area" means the geographic area 'generally contiguous' to an existing reserve community within which existing on-reserve programs and community services can be delivered, infrastructure extended and installations shared, at little or no incremental cost;
- 3.6 "Approval in Principle" (AIP) means INAC's decision to recommend a proposal to the Minister, for consideration of reserve status through a submission to the Governor in Council, or by means of a Ministerial Order as permitted by Claims legislation. An AIP can be granted with or without conditions. It is given by either the Regional Director General (RDG) or the Deputy Minister (DM). Where conditions are attached to the AIP, they must be satisfied before an order in council (OIC) or Ministerial Order recommendation can be made;
- 3.7 "Environmental Impact Assessment" (EIA) means a process to identify and evaluate all potential environmental impacts that may occur as a result of a planned project on land being proposed for an addition to reserve or a new reserve. These are conducted in accordance with the *Canadian Environmental Assessment Act* and its regulations;
- 3.8 "Environmental Site Assessment" (ESA) means an analysis of a property proposed for addition to reserve or new reserve with respect to past and present uses, as well as on-site and off-site activities that may have the potential to affect the property's environmental quality, including the health and safety of occupants/residents;
- 3.9 "First Nation" and "Band" can be used interchangeably for the purposes of this directive as a "Band" defined under the *Indian Act*.

- 3.10 "Lands reserved by notation" in the territories are not covered by this directive. However, where a proposal in the territories is for a formal reserve established by OIC as defined by the *Indian Act*, this directive applies;
- 3.11 "Municipality" means a city, town, village or other built-up area with municipal authorities and includes a rural or urban municipality, as defined in relevant provincial legislation;
- 3.12 "Royal Prerogative" means the power of the Crown, as represented by the Governor in Council, to take action as an exercise of its executive power. Setting aside reserves is one such power and it is exercised by the Governor in Council acting through an OIC at the request of the Minister of INAC, or by a Ministerial Order as permitted by Claims legislation.

#### **4. ATR Process Overview**

- 4.1 The following is a general overview of the review/approval process for ATR proposals (see Annex D of this directive for more detailed procedures):
- a) First Nation forwards a BCR to INAC regional office.
  - b) Based on the BCR request, confirm in which of the three categories a proposal belongs ("Legal Obligations", "Community Additions" or "New Reserves/Other Policy").
  - c) Review/apply the relevant site-specific criteria (outlined in Annexes A to C of this directive).
  - d) Consult province, municipality, other affected government departments.
  - e) Review and recommendation by Regional ATR Committee.
  - f) RDG AIP or rejection and in cases where the Deputy Minister's approval is required, review/recommendation by the HQ ATR committee followed by Deputy Minister AIP or rejection.
  - g) Ensure any conditions attached to the AIP/complete surveys and other land transaction requirements are satisfied.
  - h) Prepare and forward Order in Council recommendation and submission or Ministerial Order to the Minister.
  - i) Minister recommends draft Order in Council to Privy Council, or approves the Ministerial Order.
  - j) Order in Council is approved or rejected.

- k) Register transaction in the Indian Lands Registry.
- l) Notify First Nation and affected third parties.

## 5. ATR Policy Categories

5.1 The first step in reviewing an ATR proposal is to confirm in which of the following three categories a proposal belongs: “**Legal Obligations**”, “**Community Additions**” or “**New Reserves/Other Policy**”. Since the process and application of the ATR site-specific criteria depend on how proposals are categorized, this is an important step. Separate site-specific criteria are set out for proposals falling under each of the three ATR policy categories in Annexes A to C of this directive. An overview of the general principles underlying the site-specific criteria is provided in Section F of this directive.

**A. Legal Obligations:** This category recognizes that Canada must fulfill its legal obligations to First Nations. It addresses proposals that seek reserve status for land based on specific claim settlement agreements under Treaty Land Entitlement (TLE), Specific Claims, court orders or legal reversions of former reserve land. Unless stipulated in a claims settlement agreement or other legal document, there is no legal obligation to grant reserve status to a particular parcel of land. Once a legal obligation involving a reserve land component is identified as the basis for the reserve proposal, the next step is to apply the site-specific criteria set out in Annex A. Subject to satisfying the requirements in the applicable claim settlement agreement or other legal document, as well as the site-specific criteria in Annex A, INAC will normally recommend reserve status for proposals based on this category.

- i) **Claims Settlement Agreements:** When a reserve proposal is based on the provisions of a settlement agreement, the first step is to carefully review the agreement for those provisions directing how this obligation will be implemented. There may be specific provisions setting out requirements that must be met, such as references to geographic location, program costs, environmental conditions, etc. Where the criteria/requirements in Annex A are inconsistent with or conflict with the provisions in a settlement agreement, the provisions in the settlement, agreement override the criteria/requirements set out in Annex A to the extent of the inconsistency or conflict. It should be noted that claims settlement agreements may apply the ATR policy fixed in time (as of the date of the agreement), or apply the ATR policy as amended from time to time. This is important for purposes of reviewing a proposal.

Most claim agreements specify a specific parcel(s) of land or a general land selection area. They also contain specific reference to any potential capital funding entitlements associated with these selections, or clearly state there is no capital funding entitlement. In those fewer cases of already settled specific claims where the settlement agreement is silent on land selection, the ATR policy is that it must involve an addition to reserve rather than the creation of a new reserve, unless the region has determined, with Department of Justice advice, that the understanding of the parties at the time of the agreement was different. Where the agreement is silent on capital funding entitlement, the ATR policy is that there is no such entitlement.

- ii) **Court Orders:** Although uncommon and therefore not set out as a separate annex in this directive, INAC may have to process a reserve proposal based on a court order, directing that land be granted reserve status. Court orders normally do not provide much, if any, detail on how the proposal should be processed or how the ATR policy should apply. INAC regions must therefore consult with the Department of Justice on how to implement a court order.

Although extremely rare, there may be court orders which actually grant reserve status to a specific parcel or parcels of land which have been the subject of a legal dispute. Where a court order includes specific direction, these directions must be followed in close cooperation with the Department of Justice.

It should be noted that cases other than those decided by the Supreme Court of Canada can be appealed to the next level. INAC staff should therefore contact the Department of Justice litigator on a file to determine when to implement a court order which either directs that reserve status be granted or which actually grants reserve status to land.

- iii) **Legal Reversions:** This category covers non-discretionary reversions of former reserve land where the original expropriation/transfer documentation included a specific and express reversion clause providing for the return of the land to Canada for the purpose of granting reserve status when the land is no longer required for the stated purpose (e.g., for railways, roads, etc.). As a matter of policy, INAC also includes reversion clauses which provide for the return of land to Canada when no longer required for the original purpose (but which do not specify returning the land to reserve status).

Where there is no reversion clause at all, the proposal is treated as a proposal under either the "Community Additions" or "New

Reserves/Other Policy” category, depending on whether it would be an addition or a new reserve.

It should be noted that reversions resulting from the restrictions in the *Railway Act* will not fall under this “Legal Reversions” policy unless there was also an express reversionary provision in the order authorizing the taking for railway purposes. Where there is no such reversionary clause, such proposals may be considered under either the “Community Additions” or “New Reserves/Policy” category (depending on whether such proposals result in an addition to reserve or new reserves).

This “Legal Obligations” category also includes ATR proposals for land which is being accepted in exchange for lands being expropriated or transferred under s.35 of the *Indian Act*.

**B. Community Additions:** This category recognizes that there is a class of routine proposals seeking the addition of land to an existing reserve community (as opposed to the establishment of a new reserve). See “Definitions”, Section C of this directive for relevant definitions.

i) **Additions to reserve proposals under this category are based on:**

- a) normal growth of the reserve community through expanding the existing reserve land base;
- b) natural geographic enhancements of the existing reserve land base; or
- c) returns of unsold surrendered land to the existing reserve land base.

For consideration under this category there can be no incremental costs to INAC beyond the region’s existing, approved budget allocation.

Where a proposal falls under this category and satisfies the site-specific criteria set out in Annex B, INAC will normally recommend reserve status.

## Community Additions (continued)

- ii) **Normal Community Growth Additions:** Community growth proposals to expand the existing reserve land base can be the result of the reserve community/capital planning process or result from the availability of land which would meet a reserve community's short or longer term requirements. These additions to reserve proposals are based on the normal growth of the existing reserve community (e.g., resulting from an increase in the on-reserve population). Examples of community growth purposes include housing, schools, churches, recreational areas, community buildings, community economic projects, etc..
- iii) **Geographic Additions:** This heading covers additions to reserve proposals based on geographic enhancements to the existing reserve community's land base. They can arise from small adjustments for road right-of-ways, land accretions, etc.

The most common are road right-of-way corrections (i.e., where the land was previously taken or surrendered for a road right-of-way but adjustments are needed after construction is finished); natural accretions of land to a reserve boundary (adjacent to an ocean, lakes, rivers or streams); or, a geographic in filling (within or adjacent to the existing reserve boundaries) where the addition would enhance the physical integrity of the reserve community.

Where natural accretions of land to a reserve boundary (adjacent to an ocean, lakes, rivers or streams) may be involved, INAC should consult the Department of Justice on how to proceed. (*\*It should be noted that not all accretions involve the ATR process, boundaries are constantly being adjusted along the banks of rivers and these adjusted boundaries are considered the reserve boundaries*).

- iv) **Unsold Surrendered Land Additions:** This category involves addition to reserve proposals for unsold surrendered land to be returned to reserve status. Where such proposals involve additions to reserves, i.e., within the service area of the existing reserve community (as opposed to the creation of new reserves) and they meet the site-specific criteria outlined in Annex B of this directive, INAC will normally recommend reserve status.

Where a proposal involves the return of unsold surrendered land which would create a new reserve, it would have to be considered under the "New Reserves/Other Policy" category of this directive, and would be subject to the site-specific criteria outlined in Annex C of this directive.

- C. New Reserves / Other Policy:** This category covers all proposals which are not “Legal Obligations” or “Community Additions ” proposals under this directive. Within this category, the 1991 ATR policy is highly restrictive and/or requires extensive analysis and “justification” of proposals under the site-specific criteria outlined in Annex C of this directive.

The types of proposals covered under this category therefore include:

- a) the establishment of new reserves for social (e.g., residential, institutional) or commercial purposes (where for example, the policy requires that First Nations demonstrate that the benefits of a proposal cannot be substantially achieved by some other means, i.e., under another form of land tenure);
- b) the establishment of new reserves resulting from provincial land offerings or new reserves resulting from unsold surrendered land not within the service area of an existing reserve community (where for example, the benefits would have to be matched against federal cost implications and other site-specific criteria);
- c) the establishment of new reserves for landless bands/communities or to relocate existing bands/communities outside existing reserve boundaries;
- d) additions to reserves or new reserves proposals resulting from legal obligations, (e.g., claims settlement agreements) where the proposal goes beyond the commitment in the relevant legal agreement (e.g., in terms of funding, land selection etc.); or
- e) community additions proposals with unresolved questions of community need, funding source, etc..

## 6. Principles for Site-Specific Criteria

- 6.1 For each of the three major policy categories in this directive, this directive includes an annex outlining the site-specific criteria applicable to each one. The following are the guiding principles underlying these criteria:



## New Reserves / Other Policy (continued)

- 6.2 **Aboriginal and Treaty Rights** The ATR process must respect Aboriginal and Treaty rights. First Nations are encouraged to ensure that other affected First Nations' interests in an ATR proposal are considered. It is possible that other First Nations or Aboriginal groups may have an Aboriginal or Treaty right to land proposed for reserve by a First Nation under this policy. In the specific claims settlement context, these interests will normally have been identified and addressed during the land selection process. However, a First Nation or Aboriginal group may assert previously unidentified Aboriginal and Treaty rights when a First Nation proposes land for reserve status. These assertions must be addressed and in such cases departmental officials should consult the *LTS Lands and Environment Fiduciary Management Strategy*, as amended from time to time, to determine how to address that potential interest.
- 6.3 Where there are competing or overlapping claims on land by Aboriginal groups, the First Nation seeking reserve status must consult with all such groups, and INAC staff should consult with Specific Claims, Comprehensive Claims or the Federal Treaty Negotiation Offices, as appropriate. As soon as possible, therefore, Aboriginal groups who are either involved or potentially involved must be notified, so that these groups have the opportunity to discuss and clarify their respective interests and work together to resolve any potentially competing or overlapping interests.
- 6.4 **Community Relations** ATR proposals share the characteristics of community boundary adjustments of provincial municipalities (i.e., change in community authority), but also involves change in land title and jurisdiction (from provincial to federal). Therefore, the normal local communications and consultation requirements of municipal boundary adjustments are compounded in the case of ATR proposals, especially since the on-reserve regime is often unfamiliar to surrounding communities and other third parties who may be involved. These issues can be further complicated in existing urban or otherwise populated areas where commercial projects are involved.
- 6.5 All of this means that an early and healthy dialogue led by the First Nation is required between the First Nation, the public and affected individuals and interest groups to increase awareness and deal with potential issues.

- 6.6 **Provincial/Municipal Relations** Unless a land acquisition involves Federal Crown land, granting reserve status changes jurisdiction from provincial and municipal to federal. Provincial and municipal jurisdiction over the land generally disappears and the land becomes subject to the *Indian Act* and First Nation by-laws. Reserve proposals may therefore potentially impact on provincial and municipal governments and this requires that these levels of government have an opportunity to express their interests.
- 6.7 Provinces and municipalities must therefore be advised of an ATR proposal within their jurisdiction and must have the opportunity to express their views on the proposal.
- 6.8 In recognition that First Nation communities and non-First Nation communities live side by side, the federal government promotes a “good neighbour” approach. This involves First Nations and municipalities sitting down together to discuss issues of mutual interest and/or concern in the same way neighbouring municipalities must do in relation to one another. Where requested by the municipality in whose boundaries the reserve is proposed to be located, or by the First Nation, there is a requirement for the First Nation and the municipality to negotiate in areas such as joint land use planning/by-law harmonization, tax considerations, service provision and future dispute resolution. However, municipal governments do not have a general or unilateral veto over the granting of reserve status.
- 6.9 The requirement to negotiate means that both parties must engage in discussions based on good will, good faith and reasonableness.
- 6.10 The need for discussions may be with respect to ATR proposals within the boundaries of a municipality (in which case consultation/negotiation leading to agreement may be necessary); or with adjacent/abutting municipalities (where consultation alone may be necessary).
- 6.11 The First Nation making the ATR proposal has the primary role in leading discussions and negotiations, as the governing body seeking to extend its governance jurisdiction into that of the province or the municipality.
- 6.12 Upon a First Nation’s request, INAC may have a role in providing technical support to the First Nation during discussions/negotiations with affected provinces and municipalities. Canada is not a party to any concluded First Nation-municipal agreements.

- 6.13 **Good Title Transfer and Third Party Interests in Land** Appropriate surveys, proper land descriptions and title searches must be done for every ATR proposal.
- 6.14 Additionally, lessees, subsurface right holders and other third parties may have legal interests in the land proposed for ATR or have a legal right of access to the land or a legal right to use the land, e.g., through leases, licences, permits, easements, rights of way, etc.
- 6.15 The change in title and jurisdiction involved in granting reserve status to land is a complicating factor affecting third party interests which does not occur in otherwise similar municipal boundary expansions. Once the land becomes a reserve, these interests will be subject to federal jurisdiction and the statutory regime of the *Indian Act*. This often involves negotiating an agreement to purchase the interests outright or to ensure that the interests remain in force and effect on the land once it is granted reserve status.
- 6.16 These third party interests must therefore be dealt with prior to the acquisition of land by INAC or the granting of reserve status. In regions where claims implementation legislation applies, it may be possible for First Nations to conduct a referendum/designation vote addressing third party interests on land being proposed under a claim before the land is granted reserve status. Otherwise, the First Nation can only designate the land after the land becomes reserve.
- 6.17 **Financial Implications and Funding Sources** An ATR reserve proposal may potentially impact on INAC and other federal government programming. Additions to reserves and new reserves must be affordable and the funding sources for any anticipated costs must be identified before an AIP can be given.
- 6.18 INAC funding impacts may include increased requirements for investments in capital and maintenance funding to service the new or expanded reserve land base. (e.g., both core and non-core funding for construction of roads and road maintenance, new schools, extension of subdivisions, sewer and water, etc.), as well as ongoing program funding (to support social programs, health services, education, etc.), to serve any potential increase in the on-reserve population.

- 6.19 Therefore, unless the potential funding requirements are not immediate and/or the First Nation is willing to acknowledge that future requirements will only be met as funds become available through the normal budgetary process, funding requirements need to be forecasted and the source of funds identified. The funding source can be from the First Nation's available funding allocation from INAC, First Nation's own resources, or other (e.g., from a province offering land to a First Nation).
- 6.20 For Claims ATRs, incremental funding entitlements should be provided for in or at the time of the claim settlement. For Community Addition proposals, funding requirements must be met from the First Nation itself or the INAC regional office's budget. As a result, the ATR policy promotes good long-term community and financial planning in advance of specific ATR proposals.
- 6.21 **Good Environmental Practices** Once land becomes reserve, the First Nation and INAC take on a number of environmental responsibilities. This means that both parties need to ensure that land is not contaminated by its former or anticipated uses. Where there is any degree of contamination, it must be assessed and, if necessary, remediated according to the planned use of the land.
- 6.22 The requirement to assess the past and future environmental condition of proposed reserve land is based on concern for the health and safety of First Nation members who will reside on and/or use the land and on the budgetary concern that the clean-up of contaminated lands can be extremely expensive.
- 6.23 The environmental requirements outlined in each annex to this directive must be applied in accordance with Chapter 12 of the Land Management Manual, as amended from time to time.

## 7. References

- a) INAC's Land Management Manual, as amended from time to time. This directive forms part of Chapter 10 of this Manual and, along with Chapter 12 of this Manual, replaces Chapter 9 of the previous Manual in its entirety.
- b) "Additions to Reserve Policy": Criteria for proceeding in cases of disputes on tax loss" directive, dated November 17, 1997 (issued by: Director, Lands, INAC HQ).
- c) INAC's "Addition to Reserve Communications/Consultation Checklist", as amended from time to time;

- d) INAC's New Bands and Band Amalgamations Policy, 2003.  
**Contact:** Registration Revenues and Band Governance Branch, INAC HQ.
- e) *Canadian Environmental Assessment Act* and regulations, as amended from time to time. See also *Environmental Assessment General Procedures (IIAP)*, October 1995, as amended from time to time;
- f) INAC's *Lands and Environment Fiduciary Management Strategy*, (dated January 2, 1994), as amended from time to time;
- g) Treasury Board Real Property Management Policy Manual, as amended from time to time.
- h) *Federal Real Property and Federal Immovables Act* and regulations, as amended from time to time.
- i) *Canada Lands Surveys Act* and regulations, as amended from time to time. See also *Framework Agreement between Lands and Trust Services, INAC and Legal Surveys Division, Natural Resources Canada, Feb 6, 1998*, registered in the Indian Land Registry under Instrument No. 258930, for the type of land description requirements for reserve land transactions, including additions/new reserves.  
**Contact:** Manager, Surveys, LTS, INAC HQ. Tel: (819) 994-6743.
- j) INAC's *Indian Lands Registration Manual*, as amended from time to time.  
**Contact:** Registrar, Indian Land Registry, INAC HQ. Tel: (819) 997-8123
- k) Geographical Names Board of Canada (formerly Canadian Permanent Committee on Geographic Names (CPCGN); *Principles and Procedures for Geographic Naming*, 1990; Ministry of Supply and Services, ISBN 0-662-57902-X. Also *CPCGN Strategic Plan*, November, 1993.  
**Contact:** Project Manager, Geographical Names Board of Canada, Centre for Topographic Information, Natural Resources Canada HQ. Tel: (613) 992-3892.
- l) *Indian Taxation Advisory Board* for information on First Nation/municipal tax/service agreements and models.  
**Contact:** Ottawa Office: Tel: (613) 954-9972;  
Kamloops Office: Tel: (250) 828-9857

- m) For information on this directive or to obtain any of the above-noted references, please contact the following:

**INAC Headquarters:**

**Manager**, Land Management Section, HQ Lands Directorate/LTS.  
Tel: (819) 953-2920.

**INAC Regions:**

**Atlantic Region:** Manager, Lands, Environment and Natural Resources  
Tel: (902) 661-6257

**Quebec Region:** Manager, Lands and Resources  
Tel: (418) 951-8810 Fax: (418) 648-3930

**Ontario Region:** Manager, Lands Negotiations  
Tel: (416) 973-6234

**Manitoba Region:** Manager, Lands and Resources  
Tel: (204) 984-0908

**Saskatchewan Region:** Manager, Lands Advisory Services  
Tel: (306) 780-6003

**Alberta Region:** Manager, Statutory and Fiduciary Services  
Tel: (780) 495-2563

**B.C. Region:** Manager, Lands  
Tel: (604) 666-0335

**Yukon Region:** Manager, Lands and Trust Services  
Tel:(867) 667-3356

**NWT Region:** Manager, Environment and Lands  
Tel: (867) 669-2611

## **Annex A**

# **Site-Specific Criteria for Legal Obligations Proposals (Treaty Land Entitlement, Specific Claims and Legal Reversions)**

### **1. General**

- 1.1 These criteria apply to proposals that seek reserve status under specific claim settlement agreements (Treaty Land Entitlement, Specific Claims), as well as to legal reversions of former reserve land (where the original expropriation/transfer included a specific reversion clause returning the land to Canada when the land is no longer required for the original purposes, e.g., railways, roads, etc.).
- 1.2 In order to implement a court order, INAC regions must consult with the Department of Justice.
- 1.3 Where site-specific criteria are covered by claim settlement agreements, the provisions in such agreements take precedence over any of the site-specific criteria in this annex.
- 1.4 Where settlement agreements are silent on land selection, the ATR policy is that proposal must involve additions to reserve (as opposed to new reserves).
- 1.5 Where settlement agreements are silent on funding entitlement, the ATR policy is that there is no such entitlement.
- 1.6 In cases of legal reversions, proposals can result in additions to reserves or new reserves. It should be noted that reversions resulting from the restrictions in the *Railway Act* will not fall under the “Legal Obligations/Legal Reversions” policy of this directive unless there was also an express reversionary provision in the order authorizing the taking for railway purposes. Where there is no such reversionary clause, such proposals may be considered under either the “Community Additions” or “New Reserves/Policy” category (depending on whether they result in additions to reserves or new reserves).
- 1.7 Regions, and, where applicable, specific claim negotiators, should ensure that any communications planning with the First Nation is addressed well in advance of land selections by the First Nation.

## 2. Environmental Site Assessment (ESA)

- 2.1 As directed by Treasury Board policy, an environmental site assessment shall be conducted for any land acquisition. Therefore, an environmental site assessment must be done for any ATR proposal in accordance with Chapter 12 of INAC's Land Management Manual, as amended from time to time, to determine the state of the existing site. The policy aims to determine what **past or present activities** might have adversely affected the site, and to have the previous/current user(s) correct these conditions prior INAC acquiring the land and setting it aside for the use and benefit of the First Nation(s).
- 2.2 Proposed ATR submissions should also include an estimate of the costs of an environmental site assessment, if INAC has determined it will pay for such costs.

## 3. Environmental Impact Assessment (EIA) for Any Project

- 3.1 Pursuant to the *Canadian Environmental Assessment Act* (CEAA), a federal authority must carry out an environmental impact assessment before it exercises any prescribed power or authority, duty or function, which would enable a project as defined under that Act to proceed either in whole or in part. Therefore, if there is a known project proposed on the land to be set aside as reserve which triggers the application of CEAA, CEAA requires that an environmental impact assessment (EIA) be carried out for these proposed activities. Note that it is the project proposed for the land under consideration for ATR that may trigger CEAA, not the Governor in Council or Ministerial Order creating the reserve. The EIA report will normally be prepared by the project proponent, under the direction of the First Nation and the department. Please note that this assessment is for **future proposed activities**, and is different from the environmental site assessment required under Section 2.1 above, which is for past or current activities which took place on the land and which may have contaminated the land.
- 3.2 Refer to Chapter 12 of INAC's Land Management Manual, as amended from time to time.



## 4. Financial Implications and Funding Sources

- 4.1 Proposals which require an increase to the department's A - base will generally not be approved, except in cases provided for in claim settlements or treaty/legal obligations. Funding issues cannot be used to frustrate a legal ATR once the legal commitment has been made. Therefore, increases that might be required to approved INAC budgets, and appropriate sources of funds to facilitate legal ATRs, should be identified prior to signing the relevant claim settlement agreement.
- 4.2 The short-term and long-term financial implications of proposed additions to reserves/new reserves should therefore be reviewed by the parties and appropriate provisions contained in the concluded claim settlement agreement. Provisions will vary depending on whether the land is already identified prior to claim agreement ratification or if the First Nation will proceed with land purchases after ratification, as well as on the potential lapse of time before the land is acquired.
- 4.3 Where a claim settlement agreement is silent on incremental costs, the ATR policy is that there is no funding entitlement associated with the addition to reserve or new reserve with respect to transaction costs, as well as infrastructure, housing, and other capital costs. These must be identified and addressed in the agreement.
- 4.4 Ongoing operational and program costs, unless otherwise provided for in the claim settlement agreement, must be sourced from the region's operating budget. Once this internal resourcing process has been completed to the satisfaction of all parties the First Nation's proposal can be given approval in principle.
- 4.5 Therefore, regions have the responsibility to forecast non-discretionary claims-related ATR pressures resulting from such agreements through INAC's financial management system so that they are in a position to respond to individual legal requests without delay.

## 5. Other Federal Government Departments/Agencies

- 5.1 The cost implications of ATR proposals for other federal government departments and agencies should also be provided for in the claim settlement agreement. Since these pressures cannot be used to frustrate a legal commitment to reserve creation, First Nations should be informing other federal departments and agencies of potential operational pressures in advance of potential reserve creation, i.e., preferably, before claim settlement agreements are concluded. Notice of proposed individual additions however should be given, as a courtesy, to other affected federal government departments or agencies, e.g., Health Canada, the RCMP, etc. Three months should be allowed for a response.

## 6. Existing Encumbrances

- 6.1 Land to be acquired under an ATR proposal may be subject to either existing legal interests in the land or existing rights to use the land. Examples of such encumbrances are leases, licences, permits, easements, rights of way, etc. The claim settlement agreement should provide how these interests will be treated.
- 6.2 In order to determine what, if any, encumbrances there are, INAC should ask the Department of Justice to arrange for a title search to be done against the land which is the subject of a proposal.
- 6.3 These encumbrances, which are legal interests in or rights to use the land, are distinct from the non-legal issues or concerns that a municipality or other third party may raise and should not be confused with such issues.
- 6.4 Where such encumbrances are not addressed in the settlement agreement, they should be minimized to the extent possible by the time the land is granted reserve status. This will allow the First Nation to enjoy the intended benefits from its proposed land use. If necessary, a limited degree of encumbrance is acceptable, as long as it does not affect the First Nation's proposed land use and does not conflict with the *Indian Act*, e.g. short-term licences granted under the *Federal Real Property and Federal Immovables Act* (FRPFIA) or provincial grants of subsurface mineral rights.

- 6.5 Existing encumbrances must be specifically identified and mechanisms for dealing with them must be determined in conjunction with the Department of Justice prior to the proposed acquisition by INAC. Encumbrances include both registered and unregistered interests/uses (where such unregistered interests are known).
- 6.6 Unless otherwise provided for in the claim settlement agreement, consistent with the objective of speeding up the ATR process, consideration should be given to taking title to the land subject to the existing interests/uses, as opposed to negotiating the revocation of such interests/uses and their conversion into an interest/use under the *Indian Act*. On this last point, if a third-party is concerned over the legality and/or certainty of its interest or right to use the land, another technical option is to create the interest/use under FRPFIA, set the land aside subject to the FRPFIA interest/use and then convert the interest/use into an *Indian Act* transaction once the land has reserve status.

## **7. Access**

- 7.1 Where third party land would be "landlocked" by the addition to reserve or new reserve, legal access over the proposed reserve is to be negotiated, as a legal conveyancing requirement, by the First Nation before agreement in principle is granted. The need for access to utilities should also be negotiated with respect to the proposed reserve land. Upon First Nation request, INAC may lend technical assistance in support of the First Nation's negotiating lead.

## **8. Contiguity of Multiple Parcels**

- 8.1 Where more than one parcel is proposed to be set aside as reserve, parcels should be contiguous/adjacent to one another.

## **9. Parcel Boundaries**

- 9.1 Where relevant, the boundaries of additions/new reserves should follow natural water boundaries.
- 9.2 Parcel boundaries shall be described in accordance with the February 6, 1998 INAC/NRCan agreement on legal descriptions.

## 10. Mines and Minerals

- 10.1 Where the First Nation is not conducting the land purchase, INAC shall ensure that the First Nation Council is advised of any exclusions with respect to mine and mineral rights.
- 10.2 If a third party has subsurface rights for the parcel of land to be set aside as reserve, access over the reserve to exercise those rights, or a buy-out of those rights must be negotiated prior to the lands being granted reserve status. Upon a First Nation's request, INAC may provide technical assistance in support of the First Nation's lead in negotiations.

## 11. Provincial Considerations

- 11.1 The affected province must be consulted in writing on the potential impact of an ATR proposal on provincial programs and services. Any issues must be resolved and documented by written correspondence prior to finalization and ratification of the specific claim settlement agreement or other legal agreement, especially where the proposed reserve land has already been identified. However, if these consultations occur only at the time when the subsequent ATR proposals are being processed, or when a proposed land selection is made, then three months must be given to the province to express any views. Subsequent discussions however should not unreasonably delay the addition.
- 11.2 Where a First Nation selects land under a claim involving the return of unsold surrendered land, in Ontario, this requires the concurrence of Ontario, since the land is under provincial title under the provisions of the *Indian Lands Agreement* (1986).
- 11.3 While the First Nation has the lead role in discussions with provincial governments, upon request from the First Nation, INAC may have a role in providing technical assistance in support of that lead.

## **12. Municipal Considerations**

### **12.1 General:**

1. In recognition that First Nation communities and non-First Nation communities live side by side, the federal government promotes a “good neighbour” approach. This involves First Nations and municipalities sitting down together to discuss issues of mutual interest and/or concern. Where requested by a municipality or a First Nation, there is a requirement to negotiate arrangements in such areas as joint land use planning/by-law harmonization, tax considerations, service provision and future dispute resolution.
2. The potential requirement to negotiate in these areas means that both parties must engage in discussions based on good will, good faith and reasonableness. Note that the need for discussion may be with respect to ATR proposals within the boundaries of a municipality (where consultation/negotiations leading to an agreement may be necessary) or with adjacent/abutting municipalities (where consultations alone may be necessary).
3. While municipalities must be consulted in accordance with this policy, they have no general or unilateral veto with respect to reserve proposals.
4. While the First Nation has the lead role in discussions and/or negotiation with neighbouring municipalities, upon request from the First Nation, INAC may have a role in providing technical assistance in support of that lead. Canada is not a party to any concluded agreements between a First Nation and a municipality.

### **12.2 Municipal/First Nation Consultation:**

1. Where the land to be set aside as reserve is within or adjacent/abutting a municipality, the First Nation must inform that municipality in writing of the proposal under consideration. Municipalities must be given three months to respond in writing with any issues. Subsequent discussions however should not unreasonably delay the addition.

2. Issues that might arise and which may need to be covered in a First Nation-municipal agreement are the provision of municipal services, by-law compatibility, a consultation and dispute resolution process for matters of mutual concern and potential net tax loss adjustments due to the loss of municipal jurisdiction over the land. The municipality and First Nation are entitled to formalize such an agreement in writing.
3. The First Nation can accelerate the proposal by preparing draft agreements in these areas. The Indian Taxation Advisory Board may be a good source for First Nations to consult, with respect to model agreements developed by other First Nations.

### 12.3 **Municipal Tax Considerations**

1. As noted above in sections 12.1 and 12.2, one of the issues which can arise in discussions with a municipality is net tax loss adjustment. Unless otherwise provided for in a claim settlement or other legally binding agreement, the First Nation is required to negotiate a net tax loss adjustment where requested by a municipality, with assistance of the region if requested. Again, unless provided for in a claim settlement or other legally binding document, the First Nation is responsible for paying any negotiated net tax loss sum.
2. The objective of such negotiations is to allow the municipality to adjust to the net effect of the combined reduction in municipal servicing costs and reduced tax base caused by an addition proposal. It is not to compensate the municipality indefinitely for the gross level of lost taxes, given that servicing costs are also being reduced or are subject to a separate Municipal Service Agreement. (The Indian Taxation Advisory Board has computer software which can support First Nations' analysis in these areas).
3. A reasonable compensation may be determined using the following guideline:
  - a) the gross amount of taxes currently assessed on the land to be set aside as reserve, limited to the municipal share of annual taxes, excluding school and hospital taxes;

- b) any funds the municipality is receiving in provincial equalization payments;
- c) any savings which will result from a reduced delivery of services following the granting of reserve status; and
- d) the relative size of the loss in relation to the total tax revenues of the municipality.
- e) school boards do not need any compensation for tax loss adjustment given that they are already funded for tuition costs for on-reserve students and funding arrangements are available for subsidizing boards for the proportionate capital costs for reserve students. However, a First Nation may negotiate such a payment if it deems it to be appropriate. Upon a First Nation's request, INAC may have a role in providing technical assistance to support the First Nation's negotiating lead. Any such negotiations will not delay the ATR proposal.

### **13. Unresolved Provincial or Municipal Issues**

#### **13.1 If outstanding provincial issues:**

If there are outstanding provincial issues and/or concerns but the First Nation and the RDG still wish to proceed, the region must forward the proposal, with options, to INAC HQ for consideration by the Deputy Minister and/or Minister.

#### **13.2 If outstanding municipal issues:**

- a) Where a settlement/legal agreement has not dealt with how to address municipal issues and there are outstanding municipal issues and/or concerns but the First Nation and RDG still wish to proceed, the proposal must be forwarded to INAC HQ for consideration by the Deputy Minister and/or Minister. In such circumstances, the proposal may be processed if the First Nation is prepared to enter into an agreement on the issues raised by the municipality and it is deemed by the RDG that the municipality is unwilling to respond in good faith.
- b) There is a reasonable expectation on both the municipality and the First Nation that the 'good neighbour' principle is used to negotiate in good faith throughout this process.

## 14. Aboriginal or Treaty Rights

- 14.1 Unless otherwise provided for in a claim settlement or other legally binding agreement, the First Nation must consult with other First Nations or Aboriginal groups who claim Aboriginal and/or Treaty Rights (as well as with other First Nations who could reasonably be expected to have such claims) in the area of the land selected for addition to reserve/new reserve. All groups should work together to resolve any competing interests.
- 14.2 Competing claims should be expressed in writing by the claimant group. The First Nation selecting land proposed for addition/new reserve must advise INAC where there are competing claims. Where there is continuing disagreement among competing First Nations or Aboriginal groups on a proposed selection, and the selecting First Nation advises INAC that it wishes to proceed, the proposed selection must be submitted, with options, to the Deputy Minister and/or Minister for decision.
- 14.3 While other competing First Nations or Aboriginal groups must be consulted and their views respected, they have no general veto with respect to ATR proposals.
- 14.4 INAC staff should consult the *LTS Lands and Environment Fiduciary Management Strategy* for guidance with respect to any departmental responsibilities in such cases and consult Specific Claims, Comprehensive Claims or the Federal Treaty Negotiation Offices, as appropriate.



## Annex B

# Site-Specific Criteria for Community Additions Proposals

### 1. General

- 1.1 Community additions proposals must be based on:
- a) meeting a reserve community's normal growth needs for additional land to service its members as a community (such community purposes may include housing, schools, churches, recreational areas, community buildings and community economic projects); or
  - b) natural geographical enhancements (e.g., accretions, in filling, etc.) which would improve the functioning of the existing reserve base; or
  - c) returns of unsold surrendered land (which, in Ontario, also require addressing the provisions of the *Indian Lands Agreement* (1986)).
- 1.2 INAC will normally recommend reserve status for these types of proposals, subject to site-specific considerations in this annex.
- 1.3 Community additions proposals involve additions to existing reserves (as opposed to the establishment of new reserves). Therefore, proposals under this category must involve land which is within the service area of the existing reserve community. See "Definitions", Section C of this directive, for relevant definitions.
- 1.4 Assessment under this category is generally based on whether or not proposals involve planned development and are affordable.
- 1.5 The return of unsold surrendered land which would effectively create a new reserve, or result in substantially increased program costs, is not contemplated by this annex and should be addressed as a new reserve proposal under "New Reserves/Other Policy", in accordance with Annex C of this directive.
- 1.6 Where a geographic additions proposal involves natural accretions of land to a reserve boundary (adjacent to oceans, lakes, rivers or streams), INAC should consult the Department of Justice on how to proceed.

## 2. Environmental Site Assessment (ESA)

- 2.1 As directed by Treasury Board policy, an environmental site assessment shall be conducted for any land acquisition. Therefore, an environmental site assessment must be conducted for any addition to reserve in accordance with Chapter 12 of INAC's Land Management Manual, as amended from time to time, to determine the environmental state of the existing site. The policy aims to determine what **past or present activities** might have adversely affected the site, and to have the previous/current user(s) correct these conditions prior to setting the land aside for the use and benefit of the First Nation(s).
- 2.2 Proposed ATR submissions should also include an estimate of the costs of an environmental site assessment, if INAC has determined it will pay for such costs.

## 3. Environmental Impact Assessment (EIA) for Any Project

- 3.1 Further to the *Canadian Environmental Assessment Act* (CEAA), a federal authority must carry out an environmental impact assessment before it exercises any prescribed power or authority, duty or function, which would enable a project as defined under that Act to proceed either in whole or in part. Therefore, if there is a known project proposed on the land to be set aside as reserve which triggers the application of CEAA, then CEAA requires that an environmental impact assessment (EIA) be carried out for these proposed activities.
- 3.2 Note that it is the project proposed for the land under consideration for ATR that may trigger CEAA, not the Governor in Council or Ministerial Order creating the reserve. The EIA report will normally be prepared by the project proponent, under the direction of the First Nation and the department.
- 3.3 Please note that this assessment is for **future proposed activities**, and is different from the environmental site assessment required under Section 2.1 above, which is for past or current activities which took place on the land and which may have contaminated the land.
- 3.4 Refer to Chapter 12 of INAC's Land Management Manual, as amended from time to time.

## 4. Financial Implications and Funding Sources

- 4.1 This criterion recognizes that First Nation communities need to grow and adjust their boundaries (as do non-First Nation communities across Canada), and that their growth requirements should be addressed in a reasonable way. It therefore contemplates the involvement of First Nations, INAC and other parties in early community and land use planning.
- 4.2 Therefore, under this category, proposals seeking the expansion of an existing reserve should be approached according to whether or not they involve short-term development.
- 4.3 **Short-term Development:** These are reserve addition proposals which in whole or in part involve short-term development, e.g., residential, institutional, economic, etc. They may therefore have immediate federal program funding requirements, (i.e., within the current regional planning cycle), involving capital/infrastructure, as well as ongoing program costs, such as operation and maintenance or education and other social programs. In these cases, a full, cross-program cost analysis must be done with input from interested sectors of INAC and the money must be available from either the region's budget and/or the First Nation (either directly or from a third party, e.g., a province).
- 4.4 Where the First Nation and INAC are involved in a good ongoing community planning relationship, this analysis is completed at the planning stage, long before the First Nation submits its BCR to INAC seeking the addition. The land component of the overall development project can then be processed quickly under this ATR category, since all issues, including community planning/needs assessment and costing would have already been addressed. Otherwise, the review process and the granting of reserve status are delayed, creating frustrations all around.
- 4.5 **No Short-term Development:** These are addition to reserve proposals involving land which becomes available to a First Nation and which can meet the reserve community's longer term growth requirements. Where an addition to the existing reserve can serve longer term community needs and there is no planned development of the land in the short-term, no assessment of financial implications and funding sources is required (other than the costs of land acquisition), which may come from the region, the First Nation or a third party (e.g., a province).

- 4.6 In these cases, the First Nation must formally document its recognition that there is no funding entitlement being sought with the addition and that longer term costs associated with any potential development of the land will have to be sourced from the First Nation's normal funding allocation. Incremental costs therefore are to be resourced over the longer-term through the normal regional capital planning process.
- 4.7 Note that in either short or long-term development cases, where the First Nation does not have a valid community plan, the community need for the land may still need to be demonstrated, normally by feasibility studies based on good community planning principles. The criteria to be used are those set out in Annex C, section 4, of this directive.

## 5. Other Federal Government Departments/Agencies

- 5.1 Other federal government departments and agencies, e.g., Health Canada, the RCMP, should be contacted by INAC regions and given the opportunity to assess the potential impact on their program delivery resulting from proposed community additions. This forecasting should be done as part of the normal community planning process. Where this has not already been done, INAC regions must notify relevant federal departments and agencies in writing and allow three months for any comments to be provided.

## 6. Existing Encumbrances

- 6.1 Land to be acquired under an additions proposal may have existing legal interests or be subject to rights to use the land. Examples of such encumbrances are leases, licences, permits, easements, rights of way, etc.
- 6.2 In order to determine what, if any, encumbrances there are, INAC should ask the Department of Justice to arrange for a title search to be done against the land which is the subject of a proposal.
- 6.3 These encumbrances, which are legal interests in or rights to use the land, are distinct from the non-legal issues or concerns that a municipality or other third party may raise and should not be confused with such issues.
- 6.4 Any existing encumbrances should be minimized to the extent possible by the time the land is granted reserve status. If necessary, a limited degree of encumbrance is acceptable, as long as it does not affect the First Nation's proposed land use and does not conflict with the *Indian Act*.
- 6.5 Existing encumbrances must be specifically identified and mechanisms for dealing with them must be determined in conjunction with the Department of

Justice prior to the proposed acquisition by INAC. Encumbrances include both registered and unregistered interests/uses (where such unregistered interests are known).

- 6.6 Consistent with the objective of speeding up the ATR process for the First Nation, consideration should be given to taking title to the land subject to the existing interests/uses, as opposed to negotiating the revocation of such interests/uses and their conversion into an interest/use under the *Indian Act*. On this last point, if a third party is concerned over the legality and/or certainty of its interest or right to use the land, another technical option is to create the interest/use under the FRPFIA, set the land aside subject to the FRPFIA interest/use and then convert the interest/use into an *Indian Act* transaction once the land has reserve status.

## **7. Access**

- 7.1 Where third party land would be "landlocked" by the addition to reserve, legal access over the proposed reserve is to be negotiated, as a legal conveyancing requirement, by the First Nation before an AIP is granted. The need for access to utilities should also be negotiated with respect to the proposed reserve land. Upon the First Nation's request, INAC may provide technical assistance in support of the First Nation's negotiating lead.

## **8. Contiguity of Multiple Parcels**

- 8.1 Where more than one parcel is proposed to be set aside as reserve, they should be contiguous/adjacent to one another.

## **9. Parcel Boundaries**

- 9.1 Where relevant, the boundaries of reserve additions should follow natural water boundaries.
- 9.2 Parcel boundaries shall be described in accordance with the February 6, 1998 INAC/NRCan agreement on legal descriptions.

## 10. Mines and Minerals

- 10.1 Where the First Nation is not conducting the land purchase, the INAC lands officer shall ensure that the First Nation Council is advised of any exclusions with respect to mine and mineral rights.
- 10.2 If a third party has subsurface rights for the parcel of land to be set aside as reserve, the First Nation must negotiate either access over the reserve to exercise those rights or a buy-out of those rights.

Where requested by a First Nation, INAC may have a role in providing technical assistance in support of the First Nation lead in negotiations.

## 11. Provincial Considerations

- 11.1 The affected province must be notified of the proposal in writing and three months given to the province to express its views on the potential impact of the proposal on provincial programs and services. While issues must be resolved and documented by written correspondence, subsequent discussions should not unreasonably delay the addition.
- 11.2 The First Nation should also obtain the province's concurrence that, among other issues the Province may raise, there are no competing land use problems for the site in question, prior to submitting its proposal to INAC. Otherwise, there could be delays afterwards as the First Nation/INAC seek this determination.
- 11.3 Provincial concurrence will be required for returns of unsold surrendered lands for those provinces where the land is in provincial title, e.g., in Ontario pursuant to the *Indian Lands Agreement Act* (1986).
- 11.4 Upon a First Nation's request, INAC may have a role in providing technical assistance in support of the First Nation lead in discussions/negotiations with a province.

## 12. Municipal Considerations

### 12.1 General:

In recognition that First Nation communities and non-First Nation communities live side by side, the federal government promotes a “good neighbour” approach. This involves First Nations and municipalities sitting down together to discuss issues of mutual interest and/or concern. Where requested by a municipality or a First Nation, there is a requirement to negotiate arrangements in such areas as joint land use planning/by-law harmonization, tax considerations, service provision and future dispute resolution.

12.2 The potential requirement to negotiate in these areas means that both parties must engage in discussions based on good will, good faith and reasonableness. Note that the need for discussion may be with respect to ATR proposals within the boundaries of a municipality (where consultation/negotiations leading to an agreement may be necessary) or with adjacent/abutting municipalities (where consultations alone may be necessary).

12.3 While municipalities must be consulted in accordance with this policy, they have no general or unilateral veto with respect to reserve proposals.

12.4 While the First Nation has the lead role in discussions and/or negotiation with neighbouring municipalities, upon request from the First Nation, INAC may have a role in providing technical assistance in support of that lead. Canada is not a party to any concluded agreements between a First Nation and a municipality.

12.5 **Municipal/First Nation Consultation:** Where the land to be set aside as reserve is within or adjacent/abutting a municipality, the First Nation must inform that municipality in writing of the proposal under consideration. Municipalities must be given three months to respond in writing with any issues. However, subsequent discussions should not unreasonably delay the proposal.

12.6 The First Nation should ensure a neighbouring municipality does not have competing land use plans for the land in question, prior to submitting its proposal to INAC. Otherwise, there could be delays afterwards as the First Nation/INAC seek this determination.

- 12.7 Other issues that might arise and which may need to be covered in a First Nation-municipal agreement are the provision of municipal services, by-law compatibility, a consultation and dispute resolution process for matters of mutual concern and potential net tax loss adjustments due to the loss of municipal jurisdiction over the land. The municipality and First Nation are entitled to formalize such an agreement in writing.
- 12.8 The First Nation can accelerate the proposal by preparing draft agreements in these areas. The Indian Taxation Advisory Board may be a good source for First Nations to consult, with respect to model agreements developed by other First Nations.
- 12.9 **Municipal Tax Considerations:** As noted above in Sections 12.1 and 12.2, municipalities may raise the matter of tax loss in discussions with a First Nation. Unless already covered by a service or other agreement with the municipality, where requested by a municipality, the First Nation is responsible for paying any negotiated net tax loss adjustment and has the lead in negotiations with the municipality. Upon a First Nation's request, INAC may have a role in providing technical assistance in support of the First Nation's negotiations lead.
- 12.10 The objective of tax loss negotiations is to allow the municipality to adjust to the net effect of the combined reduction in municipal servicing costs and reduced tax base caused by removing land from the municipal tax base. It is not to compensate the municipality indefinitely for the gross level of lost taxes, given that servicing costs are also being reduced or are addressed in a separate municipal service agreement. The Indian Taxation Advisory Board has computer software which can support First Nations' analysis in these areas.
- 12.11 A reasonable compensation may be determined using the following information:
1. the gross amount of taxes currently assessed on the land to be set aside as reserve, limited to the municipal share of annual taxes, excluding school and hospital taxes;
  2. any funds the municipality is receiving in provincial equalization payments (these are provincial funds provided to municipalities which for any reason suffer a loss to their tax base);
  3. any savings which will result from a reduced delivery of services following the granting of reserve status;
  4. the relative size of the loss in relation to the total tax revenues of the municipality;



- 12.12 School boards do not need any compensation for tax loss adjustment given that they are already funded for tuition costs for on-reserve students and funding arrangements are available for subsidizing boards for the proportionate capital costs for reserve students. However, First Nations may negotiate such a payment if they view it as appropriate. Upon the First Nation's request, INAC may have a role in providing technical support to the First Nation during negotiations.

### **13. Unresolved Provincial or Municipal Issues**

- 13.1 **If outstanding provincial issues:** Where provincial consultations indicate that there are significant competing land use or other issues that cannot be resolved with the province and the First Nation/RDG wish the project to be considered, then the proposal will have to be forwarded, with options, to the Deputy Minister and/or Minister for review.
- 13.2 **If outstanding municipal issues:** Where the First Nation and the municipality cannot resolve competing land use or other issues, such as tax loss, by-law harmonization, etc., but the First Nation and the RDG still want to proceed, the proposal must be forwarded, along with the region's recommendation, for consideration by the Deputy Minister and/or Minister. A proposal may proceed in cases where the First Nation is prepared to enter into an agreement on the issues raised by the municipality and it is deemed by the RDG that the municipality is unwilling to respond in good faith.
- 13.3 There is a reasonable expectation on both the municipality and the First Nation that the 'good neighbour' principle is used to guide and underlie good faith negotiations throughout the process.

### **14. Aboriginal or Treaty Rights**

- 14.1 Since community additions involve land that is within the service area of existing reserves, there are not normally any competing claims in the land from other First Nations. If there is any doubt, however, the First Nation must consult with other First Nations or Aboriginal groups who claim Aboriginal and/or Treaty Rights (as well as with other First Nations who could reasonably be expected to have such claims), in the area of the land selected for the addition to reserve. All groups should work together to resolve any competing interests.
- 14.2 Competing claims should be expressed in writing by the claimant group. The First Nation selecting land proposed for addition must advise INAC in cases where competing claims are asserted.

- 14.3 While other competing First Nations or Aboriginal groups therefore must be consulted and their views respected, they have no general veto with respect to reserve additions.
- 14.4 Where there is continuing disagreement among competing First Nations or Aboriginal groups on a proposed selection, and the selecting First Nation advises INAC that it wishes to proceed, the proposal must be submitted, with options, to the Deputy Minister and/or Minister for decision.
- 14.5 INAC staff should consult the *LTS Lands and Environment Fiduciary Management Strategy* for guidance with respect to any INAC responsibilities in such cases and consult Specific Claims, Comprehensive Claims or the Federal Treaty Negotiation Offices, as appropriate.

## Annex C

### Site-Specific Criteria for New Reserves/ Other Policy Proposals

#### 1. General

- 1.1 ATR proposals which fall outside the “Legal Obligations” and “Community Additions” categories are included in the “New Reserves/Other Policy” category of this directive. They are therefore considered on an exceptional basis under this annex because they raise the following types of issues:
- 1.2 New reserve: a proposal seeks reserve status for a new reserve (which in the case of a claim, is not provided for in the claim settlement agreement); or,
- 1.3 Cost: a proposal raises cost issues (which cannot be sourced from the region’s budget, the First Nation or third party, e.g., a province):
  - a) in the case of a claim, the proposal goes beyond the provisions of a settlement agreement; or,
  - b) in the case of a community addition, the First Nation is not willing to formally acknowledge that there is no funding entitlement associated with the proposal.
- 1.4 Community need: the proposal raises basic questions of the community’s need for the land that have not been resolved through a previous/updated or current community plan. Therefore, the community’s need remains to be demonstrated via the application of accepted demographic and community planning principles in accordance with Section 4 of this annex.
- 1.5 The treatment of each of these issues on a site-specific basis has been maintained **as per the 1991 ATR policy** and is highlighted in section 2 below.

## 2. New Reserves

- 2.1 **Economic purposes:** Proposals to create new reserves for economic reasons will not be approved if the economic benefit could be substantially achieved under another form of land holding (i.e., non-reserve land owned by a First Nation corporation). The tax advantage associated with reserve status is not in itself considered to be sufficient justification for reserve status under this heading.
- 2.2. **Social Need:** In order to consider new reserve proposals based on social need (e.g., housing, schools, churches, recreational areas, community buildings), it must be demonstrated that the social need cannot be addressed through some other form of land holding (i.e., non-reserve land held by a First Nation owned corporation) or from the existing reserve community land base.
- 2.3. **Provincial Land Offerings:** There may be instances where a province has an interest in offering land to a First Nation and the First Nation wishes to have the land made into a new reserve. INAC may consider a new reserve proposal which involves the provision of land from a province to a First Nation under the following specific circumstances.
- 2.3.1 **Land Claims:** INAC may consider creating a new reserve to facilitate a land claim settlement between a province and a claimant First Nation. However, it should be consulted by the parties at the outset of negotiations on its position in view of the following considerations:
- i) reserve status should only be considered where other forms of land holding are either unfeasible or inappropriate;
  - ii) the question of offsetting claims or obtaining a release for a related claim the First Nation may have against Canada (this question should be put to Specific Claims for review); and
  - iii) the cost implications associated with the transfer of the land to reserve status, as well as those related to planned development, should normally be borne by the province.

2.3.2 **Social/Economic Purposes:** INAC may consider creating a new reserve from a provincial land offering for social or economic purposes where the following considerations are satisfied:

- i) existing INAC policy relating to social or economic need will be applied; and
- ii) the province has agreed to pay for the costs of infrastructure and related support once the lands are granted reserve status *or* INAC has agreed to cost share or pay for infrastructure and ongoing program costs.

2.3.3 Where a proposal is based on economic purposes, INAC should encourage the province and the First Nation to explore other arrangements, e.g., instead of reserve land, land held by a First Nation owned corporation or the execution of resource-sharing agreements with respect to the development of provincial Crown lands.

2.4 **Community Relocations:** New reserve proposals involving relocations of reserve communities to land added to a reserve or a new reserve land base derive from the occurrence of natural disasters such as flooding, or restrictive reserve development potential. The site-specific considerations relate to comparing the cost-benefit of the relocation against a variety of other options.

2.4.1 **Natural Disasters:** INAC will continue to provide the necessary assistance (including the provision of reserve land by adding to or creating a new reserve or by relocating a reserve community within an existing reserve) where a natural disaster (e.g., flooding) threatens the immediate safety of a community's residents, or where such a disaster has already occurred. When relocation is the most viable long-term option according to the criteria set out below, INAC will assist the First Nation in relocating the community on an urgent basis. INAC should, however, seek to mitigate the threat by taking preventive or remedial action before considering relocation.

2.4.2 A proposed relocation must be assessed according to other site-specific considerations as well as the following considerations which are unique to proposals resulting from a natural disaster:

- i) the risk involved if the community remains at the original site;
- ii) the nature and extent of future risk;
- iii) the extent of preventive or remedial action required;
- iv) the cost of undertaking preventive or remedial measures compared to the cost of relocation; and
- v) the overall benefits to the community for each option.

2.4.3 Where a natural disaster has occurred, INAC and the First Nation should immediately assess options available for re-establishing the community. If the possibility of a recurrence is high and on-site mitigation is limited, relocation should be seriously considered. INAC will assist the First Nation in re-establishing the community to its pre-disaster state as quickly as possible.

2.4.4 **Restricted Reserve Development:** INAC may consider proposals involving the relocation of a reserve community (by adding to or creating a new reserve or by relocating a reserve community within an existing reserve) where the following criteria are met:

- i) the normal physical development at the existing reserve location is restricted due to adverse topographic or soil conditions, or results from other exceptional circumstances related to health and safety; and
- ii) the development of the community at the proposed reserve site is the most cost effective option.

2.4.5 The cost effectiveness of a proposal should be determined by comparing a detailed analysis of the costs associated with relocating the community to the costs of meeting the community's needs at the existing reserve. A land exchange option should be considered in all proposals and a net increase in the reserve land base should only be considered where a specific rationale to justify the increase is provided and approved.

2.5 **Landless Bands/Indian Communities:** INAC will consider requests to provide a reserve land base for landless bands or landless Indian communities on a case-by-case basis in accordance with the criteria outlined below.

2.5.1 **Landless Bands:** A request for a reserve land base under this policy justification must meet the following criteria:

- i) the request should originate (by way of BCR) from *an officially recognized band* which does not have a land base (the request may also form part of a proposal to create a new band under INAC's New Bands policy, in which case the request will originate from a community which will only become an officially recognized band once the Ministerial Order creating the new band has been signed);
- ii) the requesting band must have an *existing, viable and ongoing community* located at the site of the proposed reserve *or* it must be able to justify a relocation from an *existing, viable and ongoing community* to a new site under the relocation provisions of this policy (long-term cost to INAC will be a major factor under a relocation justification).
- iii) where appropriate, a provincial contribution to the necessary capital and ongoing operation and maintenance (O & M) costs should be sought and negotiated by the band; and
- iv) all other options must have been diligently pursued and eliminated, e.g., the provision of land from an existing reserve which has been set aside for another band.

2.5.2 **Landless Indian Communities:** Proposals under this heading are divided into two categories: those involving a community which is contiguous/adjacent to an existing reserve and those where the community is physically separate from an existing reserve. Each proposal will be dealt with separately as outlined below.

a) Contiguous Communities

5. INAC will consider proposals for an addition to reserve in order to facilitate reserve residence for a landless community composed of mainly status Indians living off, but contiguous to, an existing reserve. In addition to satisfying the other site-specific considerations, the proposal must meet the following criteria:
  - vi) the proposal must originate (by way of BCR) from the band for whose benefit the existing reserve has been set aside;
  - ii) most of the residents of the off-reserve community must be status Indians comprising an *existing, viable and ongoing community* located at the site of the proposed reserve;
  - iii) there must be documented evidence that a majority of the residents of the off-reserve community support the proposal (such support may be indicated in a manner satisfactory to the members of the community in accordance with community customs);
  - iv) where appropriate, a provincial contribution to the necessary capital and ongoing O & M should be sought and negotiated by the band; and
  - v) all other options must have been diligently pursued and eliminated, e.g., the relocation of the contiguous community to the existing reserve.
2. It is recommended that the members of the off-reserve community undertake membership in the band for whose benefit the existing reserve has been set aside by the time the land is added to reserve. Otherwise, community residents should be advised that they will be treated as third parties and that their interests will be addressed accordingly.



- b) Non-Contiguous Communities
1. INAC will consider proposals to provide reserve land for a landless community which is physically separate from an existing reserve and which is composed mainly of status Indians who want to become affiliated with an existing band. This type of community generally does not wish to form a new band but does want security of tenure and to enjoy the advantages of reserve residency, e.g., taxation exemptions, access to federal programs and services and the extension of band administration and by-laws to the community.
  2. In addition to satisfying the site-specific considerations set out below, the proposal must meet the following criteria:
    - ii) the proposal must originate (by way of BCR) from the band for whose benefit the existing reserve has been set aside;
    - ii) most of the residents of the off-reserve community must be status Indians comprising an *existing, viable and ongoing community* located at the site of the proposed reserve;
    - iii) there must be documented evidence that a majority of the residents of the off-reserve community support the proposal (such support may be indicated in a manner satisfactory to the members of the community in accordance with community customs);
    - iv) where appropriate, a provincial contribution to the necessary capital and ongoing O & M should be sought and negotiated by the band; and
    - v) all other options must have been diligently pursued and eliminated, e.g., a release of land from the band to which most of the members of the off-reserve community belong.
  3. It is recommended that those community residents who are not members of the existing band undertake to obtain band membership by the time the reserve is created. Otherwise, community residents should be advised that they will be treated as third parties and that their interests will be addressed accordingly.”

### 3. Cost Issues:

- 3.1 For an ATR proposal with unresolved cost issues to be reviewed on an exceptional basis, a rigorous cost-benefit analysis is required to show that the associated costs are reasonable in terms of the benefits which will accrue. The benefits of a proposal must be demonstrated through a community land needs study/plan based on accepted demographic and community planning principles. (See Section 4 in this Annex).
- 3.2 The proposal must also be cost-effective in relation to the following options:
- i) the availability of suitable surplus federal Crown lands from Public Works and Government Services Canada, or other federal government departments;
  - ii) the possibility of an exchange of an unused or unsuitable portion of the reserve for other suitable land (e.g., provincial Crown land);
  - iii) the acquisition of provincial Crown land and a provincial contribution towards the capital and ongoing costs associated with the proposal (such contribution to be sought and negotiated by the First Nation, with technical support from INAC if requested by the First Nation);
  - iv) the acquisition of private land;
  - v) the use of other reserve land set aside for the First Nation;
  - vi) a First Nation owned corporation holding title to the land (as opposed to reserve status) or using other First Nation owned land already held in fee simple;
  - vii) a First Nation's ability to contribute to land purchase and any program costs;
  - viii) the acquisition of other land generally contiguous to or in the service area of the existing reserve;
  - ix) the long-term potential of the new reserve to foster a division of the existing First Nation requesting the new reserve, and the resulting long-term cost implications.

## 4. Community Need Issues

4.1 Questions of community need can only be effectively resolved through the use of sound community planning principles.

4.2 The following factors will be considered in determining band requirements:

- i) data on the future requirements of land for community purposes, based on a demographic analysis (future projections should cover at least 15 years but generally not more than 25 years);
- ii) where the proposal is based on housing requirements, a review of existing and projected housing density;
- iii) the potential of the existing reserve base to meet future land requirements, taking into account:
  - a) the topography of the reserve (size, location, soil, etc.);
  - b) existing land use;
  - c) existing land use plans or zoning by-laws *which are being actively implemented* (these should be considered in determining how much land is available for residential purposes); and
  - d) existing patterns of land holding on the reserve (where there are large areas of reserve land which are held by a few individuals and are suitable for community development purposes, an internal land reallocation may be required before INAC will consider adding land to the existing reserve land base, especially where this would be the least costly option);
- iv) the possibility of exchanging an unused or unsuitable portion of the reserve for other land.

Where a land reallocation is required by INAC and the First Nation and the locatee cannot agree on a voluntary sale of the land, the Minister may, pursuant to subsection 18(2) of the *Indian Act* and with the consent of the band council, authorize the "expropriation" of locatee land in accordance with INAC policy and procedures (set out in Chapter 4, INAC's Land Management Manual, as amended from time to time).

## 5. Environmental Site Assessment (ESA)

- 5.1 As directed by Treasury Board policy, an environmental site assessment shall be conducted for any land acquisition. Therefore, an environmental site assessment must be conducted for any addition to reserve in accordance with Chapter 12 of INAC's Land Management Manual, as amended from time to time, to determine the environmental state of the existing site. The policy aims to determine what **past or present activities** might have adversely affected the site, and to have the previous/current user(s) correct these conditions prior to setting the land aside for the use and benefit of the First Nation(s).
- 5.2 Proposed ATR submissions should also include an estimate of the costs of an environmental site assessment, if the department has determined it will pay for such costs.

## 6. Environmental Impact Assessment (EIA) for Any Project

- 6.1 Further to the *Canadian Environmental Assessment Act* (CEAA), a federal authority must carry out an environmental impact assessment before it exercises any prescribed power or authority, duty or function, which would enable a project as defined under that Act to proceed either in whole or in part. Therefore, if there is a known project proposed on the land to be set aside as reserve which triggers the application of CEAA, then CEAA requires that an environmental impact assessment (EIA) be carried out for these proposed activities.
- 6.2 Note that it is the project proposed for the land under consideration for ATR that may trigger CEAA, not the Governor in Council or Ministerial Order creating the reserve. The EIA report will normally be prepared by the project proponent, under the direction of the First Nation and the department.
- 6.3 This assessment is for **future proposed activities**, and is different from the environmental site assessment required under Paragraph 2 above, which is for past or current activities which took place on the land and which may have contaminated the land.
- 6.4 Refer to Chapter 12 of INAC's Land Management Manual, as amended from time to time.

## 7. Financial Implications and Funding Sources

- 7.1 As proposals which cannot be funded within INAC's A-base (current approved financial authorities), will not normally be approved (except in cases of

mandated claim settlements or treaty/legal obligations), all short-term and long-term financial implications must be defined and sourced prior to AIP. These include, but are not limited to, costs of land acquisition, environmental review and remediation, capital, band support, and ongoing and incremental operation and maintenance costs. Detailed assessment of such costs should be multi-sectoral at the regional level, particularly from the capital and finance programs.

- 7.2 On an exceptional basis, reserve proposals beyond a region's budget may be submitted, with regional recommendations, to the Deputy Minister of INAC for decision. Regions must demonstrate in a detailed costing assessment (see 3.1 above) how the proposal is beyond the region's and First Nation's financial capacity and how a detailed cost-benefit analysis warrants further consideration.

## **8. Long Term Site Potential**

- 8.1 The long-term business, resource, employment and taxation and demographic/community needs potential of the proposed reserve site(s) must be considered in relation to its impact on the economic self-reliance of the First Nation.

## **9. Other Government Departments**

- 9.1 Other federal government departments and agencies, e.g., Health Canada, the RCMP, should be contacted by INAC regions and given the opportunity to assess the potential impact on their program delivery resulting from ATR proposals. This forecasting should be done as part of the normal community planning process. Where this has not already been done, INAC regions must notify relevant federal departments and agencies in writing and allow three months for any comments to be provided.

## 10. Existing Encumbrances

- 10.1 Land to be acquired under an ATR proposal may have existing legal interests or be subject to rights to use the land. Examples of such encumbrances are leases, licences, permits, easements, rights of way, etc.
- 10.2 In order to determine what, if any, encumbrances there are, INAC should ask the Department of Justice to arrange for a title search to be done against the land which is the subject of a proposal.
- 10.3 These encumbrances, which are legal interests in or rights to use the land, are distinct from the non-legal issues or concerns that a municipality or other third party may raise and should not be confused with such issues.
- 10.4 Any existing encumbrances should be minimized to the extent possible by the time the land is granted reserve status. If necessary, a limited degree of encumbrance is acceptable, as long as it does not affect the First Nation's proposed land use and does not conflict with the *Indian Act*.
- 10.5 Existing encumbrances must be specifically identified and mechanisms for dealing with them must be determined in conjunction with the Department of Justice prior to the proposed acquisition by INAC. Encumbrances include both registered and unregistered interests/uses (where such unregistered interests are known).
- 10.6 Consistent with the objective of speeding up the ATR process for the First Nation, consideration should be given to taking title to the land subject to the existing interests/uses, as opposed to negotiating the revocation of such interests/uses and their conversion into an interest/use under the *Indian Act*. On this last point, if a third-party is concerned over the legality and/or certainty of its interest or right to use the land, another technical option is to create the interest/use under the *Federal Real Property and Federal Immovables Act* (FRPFIA), set the land aside subject to the FRPFIA interest/use and then convert the interest/use into an *Indian Act* transaction once the land has reserve status.

## **11. Access**

- 11.1 Where third party land would be "landlocked" by the addition to reserve or new reserve, legal access over the proposed reserve is to be negotiated by the First Nation, as a legal conveyancing requirement, before agreement in principle is granted. In addition, the need for access to utilities should be negotiated with respect to the proposed reserve land. Upon the First Nation's request, INAC may provide technical assistance in support of the First Nation's negotiating lead.

## **12. Contiguity Of Multiple Parcels**

- 12.1 Where more than one parcel is proposed to be set aside as reserve, they should be contiguous to one another.

## **13. Parcel Boundaries**

- 13.1 Where relevant, the boundaries of additions/new reserves should follow natural water boundaries.
- 13.2 Parcel boundaries shall be described in accordance with the February 6, 1998 INAC/NRCan agreement on legal descriptions.

## **14. Mines and Minerals**

- 14.1 Where the First Nation is not conducting the land purchase, INAC shall ensure that the First Nation Council is advised of any exclusions with respect to mine and mineral rights.
- 14.2 If a third party has subsurface rights for the parcel of land to be set aside as reserve, access over the reserve to exercise those rights, or a buy-out of those rights, is to be negotiated by the First Nation prior to the lands being granted reserve status. Upon the request of the First Nation, INAC may have a role in providing technical assistance in support of the First Nation's lead.

## 15. Provincial Considerations

- 15.1 The affected province must be notified by the First Nation of the ATR proposal in writing. Three months must be given to the province to set out any issues for discussion. Subsequent discussions however should not unreasonably delay the proposal.
- 15.2 The First Nation must ensure the province does not have competing land use plans for the land in question.
- 15.3 Provincial concurrence will be required for returns of unsold surrendered land in those provinces where the unsold surrendered land is under provincial title, e.g., in Ontario, pursuant to the *Indian Lands Agreement* (1986).
- 15.4 Upon the request of the First Nation, INAC may have a role in providing technical assistance in support of the First Nation's discussions/negotiations with a province.

## 16. Municipal Considerations

- 16.1 **General:** In recognition that First Nation communities and non-First Nation communities live side by side, the federal government promotes a "good neighbour" approach. This involves First Nations and municipalities sitting down together to discuss issues of mutual interest and/or concern. Where requested by a municipality or a First Nation, there is a requirement to negotiate arrangements in such areas as joint land use planning/by-law harmonization, tax considerations, service provision and future dispute resolution.
- 16.2 The potential requirement to negotiate in these areas means that both parties must engage in discussions based on good will, good faith and reasonableness. Note that the need for discussion may be with respect to ATR proposals within the boundaries of a municipality (where consultation/negotiations leading to an agreement may be necessary) or with adjacent/abutting municipalities (where consultations alone may be necessary).
- 16.3 While municipalities must be consulted in accordance with this policy, they have no general or unilateral veto with respect to reserve proposals.



- 16.4 While the First Nation has the lead role in discussions and/or negotiation with neighbouring municipalities, upon request from the First Nation, INAC may have a role in providing technical assistance in support of that lead. Canada is not a party to any concluded agreements between a First Nation and a municipality.
- 16.5 **Municipal/First Nation Consultation:** Where the land to be set aside as reserve is within or adjacent/abutting a municipality, the First Nation must inform that municipality in writing of the proposal under consideration. Municipalities must be given three months to respond in writing with any issues. Subsequent discussions however should not unreasonably delay the addition.
- 16.6 The First Nation must ensure a neighbouring municipality does not have competing land use plans for the land in question. Other issues that might arise and which may need to be covered in a First Nation-municipal agreement are the provision of municipal services, by-law compatibility, a consultation and dispute resolution process for matters of mutual concern and potential net tax loss adjustments due to the loss of municipal jurisdiction over the land. The municipality and First Nation are entitled to formalize such an agreement in writing.
- 16.7 The First Nation can accelerate the proposal by preparing draft agreements in these areas. The Indian Taxation Advisory Board may be a good source for First Nations to consult, with respect to model agreements developed by other First Nations.
- 16.8 **Municipal Tax Considerations:** Unless otherwise provided for in a claim settlement or legal agreement, the First Nation is required to negotiate a net tax loss adjustment where requested by a municipality, with assistance of the region if requested. The First Nation is responsible for paying for any negotiated net tax loss sum. The objective of such negotiations is to allow the municipality to adjust to the net effect of the combined reduction in municipal servicing costs and reduced tax base caused by an addition proposal. It is not to compensate in perpetuity for the gross level of lost taxes, given that servicing costs are also being reduced or are subject to a separate Municipal Service Agreement. (The Indian Taxation Advisory Board has computer software which can support First Nations' analysis in these areas).

- 16.9 A reasonable compensation may be determined using the following information:
1. the gross amount of taxes currently assessed on the land to be set aside as reserve, limited to the municipal share of annual taxes, excluding school and hospital taxes;
  2. any funds the municipality is receiving in provincial equalization payments;
  3. any savings which will result from a reduced delivery of services following the granting of reserve status;
  4. the relative size of the loss in relation to the total tax revenues of the municipality;
- 16.10 School boards do not need any compensation for tax loss adjustment given that they are already funded for tuition costs for on-reserve students and funding arrangements are available for subsidizing boards for the proportionate capital costs for reserve students. However First Nations may negotiate such a payment if it is seen by them as appropriate. Upon a First Nation's request, INAC may have a role in providing technical assistance in support of the First Nation's negotiating lead.

## 17. Unresolved Provincial or Municipal Issues

- 17.1 **If outstanding provincial issues:** Where provincial consultations indicate that there are competing land use or other issues that cannot be resolved with the province, and the First Nation/RDG wish the project to be considered, then the proposal will have to be forwarded, with options, to the Deputy Minister and/or Minister for review.
- 17.2 **If outstanding municipal issues:** Where the First Nation and the municipality cannot resolve competing land use or other issues, such as tax loss, by-law harmonization, etc., but the First Nation and the RDG still want to proceed, the proposal must be forwarded, along with the region's recommendation, for consideration by the Deputy Minister and/or Minister. A proposal may proceed in cases where the First Nation is prepared to enter into an agreement on the issues raised by the municipality and it is deemed by the RDG that the municipality is unwilling to respond in good faith.
- 17.3 There is a reasonable expectation on both the municipality and the First Nation that the 'good neighbour' principle is used to guide and underlie good faith negotiations throughout the process.

## 18. Aboriginal or Treaty Rights.

- 18.1 Unless otherwise provided for in a claim settlement agreement, the First Nation must consult with other First Nations or Aboriginal groups who claim Aboriginal and/or Treaty Rights (as well as with other First Nations who could reasonably be expected to have such claims), in the area of the land selected for the addition to reserve or new reserve. All groups should work together to resolve any competing interests.
- 18.2 Competing claims should be expressed in writing by the claimant group. The First Nation selecting land proposed for reserve status must advise INAC in cases where competing claims are asserted.
- 18.3 While other competing First Nations or Aboriginal groups therefore must be consulted and their views respected, they have no general veto with respect to reserve additions.
- 18.4 Where there is continuing disagreement among competing First Nations or Aboriginal groups on a proposed selection, and the selecting First Nation advises INAC that it wishes to proceed, the proposal must be submitted, with options, to the Deputy Minister and/or Minister for decision.
- 18.5 INAC staff should consult the *LTS Lands and Environment Fiduciary Management Strategy* for guidance with respect to any INAC responsibilities in such cases and consult Specific Claims, Comprehensive Claims or the Federal Treaty Negotiation Offices, as appropriate.

## Annex D

### The ATR Process

1. This annex provides a fairly detailed overview of the review and approval process which guides a First Nation's ATR proposal. It includes some process improvements recommended by both First Nation and INAC land management technicians at an ATR Process Mapping Workshop held in February 2000 (sponsored by the Joint Initiative). While most recommendations involve follow-up at the regional level, there are some which require the involvement of INAC headquarters. Additional process improvements suggested at the workshop will be incorporated into the ATR process as this work continues.
2. The ATR process officially begins when the First Nation council submits a Band Council Resolution (BCR) containing the formal proposal seeking the addition to reserve or new reserve. If the proposal involves an addition to reserve, the name and number of the existing reserve should be stated in the BCR. If the proposal involves the creation of a new reserve, the name and number of the new reserve should be identified in the BCR. Naming should be guided by the principles set out by the Geographical Names Board of Canada.
3. Wherever possible, the First Nation should submit any pertinent documentation (that will either facilitate the process or be required) with the BCR. Some examples are conditions of TLE/Specific Claims Settlement Agreements (for a "Legal Obligations" proposal), a community plan showing the demographic need, information that the cost of any proposed development can be met within the First Nation's existing regional budget allocation (for a "Community Additions" proposal), etc..
3. INAC staff will discuss the applicable ATR policy category with the First Nation, along with the need for supporting documentation which the First Nation has not already provided.
4. Once the policy category and supporting documentation have been identified, all the relevant site-specific requirements should be identified with the First Nation, who together will determine their respective roles and responsibilities within the process, e.g., with respect to communications planning, environmental site assessments, surveys, community planning requirements, third parties, etc.

**The ATR Process (continued)**

5. The First Nation will contact the province, the municipality or other federal government departments/agencies as necessary and, where applicable, initiate discussions to resolve any areas of concern with respect to the proposal. Normally, municipal issues involve the provision of services, land use/zoning harmonization, net loss of municipal tax revenue, dispute resolution, etc. Every effort should be made to complete reasonable arrangements between the municipality and the First Nation bearing in mind that formal agreements are desirable but not necessarily essential. Third-party interests must be identified and dealt with before the proposal can proceed.
6. The regional ATR Committee will review the proposal to ensure that the requirements of the ATR policy have been satisfied. To ensure that the proposal receives speedy consideration, it is important that the First Nation and INAC staff provide all the information required for the committee to make an informed decision. The committee will then recommend the proposal to the Regional Director General (RDG) for approval in principle (AIP) or rejection.
7. If a proposal is outside the RDG's AIP authority but the RDG and the First Nation still wish to proceed, the RDG must forward the proposal to be considered by the headquarters ATR Committee and subsequent Deputy Minister AIP or rejection.
8. The RDG (or the Deputy Minister of INAC) will grant an AIP or reject the proposal. The approval may be subject to conditions which must be satisfied before the Minister will recommend the granting of reserve status to the lands under the proposal.
9. It is important that any conditions attached to the approval are capable of being readily satisfied. If it is unlikely that the condition can be met, the proposal should not be sent to the RDG or the Deputy Minister for approval.
10. Any conditions attached to the approval by the RDG or Deputy Minister must be satisfied before the proposal can proceed to the next step. The First Nation will be advised by letter if the proposal has been rejected, approved, or approved with conditions. In the event of a conditional approval, the conditions will be specified in the letter.
11. After the conditions have been met, the First Nation or INAC regional office can proceed with the acquisition of the lands.

**The ATR Process (continued)**

12. Regional INAC staff will prepare the Order in Council (OIC) recommendation and submission requesting that the lands be granted reserve status, or the Ministerial Order granting reserve status.
13. The OIC submission or the Ministerial Order is sent to the Minister who recommends its approval to the Privy Council, or signs the Ministerial Order.
14. The Privy Council either rejects or approves the OIC submission.
15. If the Ministerial Order or OIC submission has been approved, the Ministerial Order or OIC is registered in INAC's Indian Lands Registry. Regional Lands staff should arrange for the registration of all related land title documents in the Indian Land Registry to be attached to, or accompany, the registration of the Ministerial Order or OIC.
16. The First Nation and other relevant parties are notified of the granting of reserve status and are provided with the registration particulars as required.

# Directive 10-2

## Partial Subsurface Interest Additions

### 1. Purpose

- 1.1 The purpose of this directive is to inform users of the possibility of setting apart partial interests in mines and minerals as reserve under the conditions set out in section 4 of this Directive.

### 2. Background

- 2.1 The issue of setting apart partial interests in mines or minerals as reserve was raised when First Nations began purchasing partial interests in mines and minerals under specific claim settlements and/or treaty land entitlements.

### 3. Definitions

- 3.1 “**Partial interests in mines or minerals**” means that a First Nation would acquire only a part of an interest in mines and minerals. For example, if a 1/4 interest is purchased, only that 1/4 interest can be set apart as reserve providing that the conditions set out in section 4 of this Directive are met.

### 4. Policy

- 4.1 The following conditions will apply when partial interests in mines and minerals are being set apart as reserve:
- a) the surface of the land under which a partial interest in mines and minerals is proposed as reserve must have reserve status pursuant to the *Indian Act*;
  - b) title to the partial interest in the mines and minerals must be acquired by the First Nation and transferred to Canada before the lands are set apart as reserve;
  - c) the First Nation must be fully informed of the complexities of dealing with partial interests in mines and minerals;

- d) a partial interest in mines and minerals cannot be explored or exploited without the appropriate provincial instrument having been first obtained, and any such instrument for mineral exploration and exploitation will not be granted by the province without the proponent having first obtained the consent of each partial interest holder;
- e) all the owners of the partial subsurface interests must sign a Joint Agreement prior to Canada proceeding with setting apart the partial interest as reserve. This agreement must detail the conditions under which this interest would be held and how it would be managed for the group of owners; and
- f) the Additions to Reserve policy must be followed when partial interests are being proposed as reserve.

## **5. Implementation**

- 5.1 This Directive takes effect immediately.



# Directive 10-3

## Accretion / Erosion

### 1. Purpose

- 1.1 The purpose of this Directive is to clarify the position of the Department concerning the natural movement of water boundaries on reserve land.

### 2. Definitions

- 2.1 **“Natural movement of water boundaries”** means change in the position of a water boundary due to accretion or erosion.
- 2.2 **“Accretion”** means the imperceptible and gradual addition to land by the slow action of water.
- 2.3 **“Erosion”** means the imperceptible and gradual loss of land by the slow action of water.
- 2.4 **“Artificial means”** means a structure that will slowly and gradually change the natural flow of a river or a stream and cause accretion or erosion.
- 2.5 **“Riparian”** means of, relating to, or living on the bank of a river, stream, etc.
- 2.6 **“Littoral”** means of, on or along the shore of the sea, a lake, etc.

### 3. Policy

- 3.1 The following general principles will apply when natural movement of water boundaries occurs on reserve lands:
- a) any lands accreting to a reserve would take on the characteristics of the reserve and any lands lost by erosion will lose the characteristics of the reserve. No order in council is required to rectify the boundary of the reserve unless there are exceptional or controversial circumstances such as litigation or contentious relations with parties. These exceptional or controversial circumstances will be determined on a case by case basis;

- b) the fact that accretion or erosion of the reserve land is caused in whole or in part by some artificial means does not prevent it from being true accretion or erosion as long as the artificial means was employed lawfully and not with the intention of producing accretion or erosion;
- c) reserve lands lost by erosion acquire the same legal characteristics as the waterbed of the water forming the boundary;
- d) accreted lands acquire the same legal characteristics as the lands being enhanced by the accretion and, as such, the accreted land will become a part of any individual interest or leasehold on the lands being enhanced;
- e) if an interest had been created on reserve lands adjacent to the accreted lands, the interest holder would obtain the benefit of the accretion, provided that the legal description of the lands over which the interest has been granted, has a riparian or littoral boundary as one of its boundaries;
- f) the right of accretion or erosion is one of the riparian or littoral rights naturally incident to lands bordering water, and any locatee or interest holder will derive the benefit from any accretion or suffer any loss due to erosion; and
- g) the person relying on the doctrine of accretion has the onus of establishing on a balance of probability that accretion did in fact occur rather than a sudden change attributable to storm, flood or human interference.

## 4. Implementation

- 4.1 This Directive takes effect immediately.

# Directive 10-4

## Small Mineral Additions

### 1. Purpose

- 1.1 This directive covers the limited circumstances in which reserve status will be granted to subsurface rights (i.e. mines and minerals) even though reserve status is not being granted to the surface. This situation normally arises where a province is excluding surface portions of the land from the transfer to Canada for the granting of reserve status. The common provincial exclusions to the surface title are public roads, highways, certain water bodies and water courses.

### 2. Background

- 2.1 There may be additions to reserve proposals where the subsurface rights are greater than the surface rights due to the exclusions by the province from the surface title. These subsurface rights can include mines and minerals which are potentially valuable resources for First Nations. The following would create this situation:
- a) The province holds the title to the surface while a private individual holds title to the subsurface. The province is willing to transfer its interest to the surface for the purpose of granting reserve status but wishes to reserve a portion for purposes such as public roads, highways, certain water-bodies and water courses. However, the subsurface owner is willing to transfer the entire underlying subsurface interest. This will result in a lesser amount of surface rights being granted reserve status than subsurface rights.
  - b) A private individual holds title to both the surface and subsurface and is willing to transfer this interest for the purpose of granting reserve status to the land. The mines and minerals may be included with the surface title or may be held under a separate subsurface title. However, the province has the option of reserving a portion of the surface title for purposes such as public roads, highways, certain water-bodies and water courses. This will result in a lesser amount of surface rights being granted reserve status than subsurface rights.
  - c) Either the province or a private individual has title to the surface and the province holds title to the subsurface. The province may, upon negotiated agreement, choose to transfer subsurface rights while reserving portions of the surface title to itself for purposes such as public roads, highways,

certain water-bodies and water courses. This will result in a lesser amount of surface rights being granted reserve status than subsurface rights.

### **3. Policy**

- 3.1 This directive does not authorize the creation of a reserve which consists of subsurface rights only. This directive does authorize setting apart as reserve the specific portions of subsurface rights described in paragraph 2.1 of this Directive.
- 3.2 When land is being acquired for the purpose of setting it apart as reserve every effort should be made to acquire equal surface and subsurface rights. However, when the land being set apart as reserve is subject to a provincial exception in the surface title, every effort should be made to include the mineral rights underlying the exception even if this makes the subsurface rights greater than the surface rights.
- 3.3 A First Nation may negotiate with either the province or a private land owner for the acquisition of the subsurface rights and may request that these mines and minerals be granted reserve status.
- 3.4 Where an addition to reserve or new reserve proposal includes a “small mineral additions” issue, the Order In Council (OIC) must be reviewed with Regional Justice and the Department Headquarters during the drafting stage to ensure that it accurately and clearly achieves its objective.
- 3.5 Where provincial Crown land has been acquired and set apart as reserve by an OIC from Canada and it is unclear what surface or subsurface rights were set apart, an amending order from the province, followed by an amending OIC from Canada, is required to clarify the rights.
- 3.6 Where small amounts of mineral rights were purchased with the intention of setting them aside as reserve but this has not been done, an omnibus OIC from Canada may be used to set the minerals apart as reserve.

### **4. Implementation**

- 4.1 This Directive takes effect immediately.

# Directive 10-5

## Small Surface Additions

### 1. Purpose

- 1.1 This Directive establishes the circumstances concerning an accelerated process (fast-track or reduced steps) to grant reserve status when the addition is very small and there are no contentious issues.
- 1.2 The intention of this Directive is to establish the circumstances whereby micro-pockets of land can be added to reserves so as to preserve the integrity of reserve boundaries by eliminating small pockets of land that do not have reserve status within those reserve boundaries.

### 2. Background

- 2.1 This Directive will only apply to small parcels of land which are additions to existing reserves.
- 2.2 This Directive will provide process instructions for granting reserve status in these specific situations.

### 3. Authority

- 3.1 Provincial order Grant to Canada from a municipality for transfer of land to the Federal Crown;
- 3.2 *Federal Real Property and Federal Immovables Act* (FRPFIA) to accept the land into the federal inventory;
- 3.3 Order in council, under the Crown's Royal Prerogative to grant reserve status to the lands.

## 4. Policy

4.1 This policy applies to small parcels of land which are usually related to lands which have been removed from reserve status through section 35 of the *Indian Act*, and which may not otherwise qualify as reversionary clause additions, such as:

- a) construction allowances - small parcels of land previously held and used for construction of roads, but that are no longer required by the province or municipality;
- b) alignment adjustments - small parcels of land which previously formed part of an existing road, but for construction or road alignment reasons are no longer required by the province or municipality (e.g. straightening of a dangerous curve).

Note: These lands may be within an urban community or municipality.

4.2 Provided there are no factors which would warrant a full review by the regional additions to reserve committee, these small additions may be approved in principle by the Regional Director of Lands and Trust Services or the equivalent position.

## 5. Process

5.1 Small surface additions do not follow the normal additions to reserve approval process.

5.2 A chronology of events/background, together with the site specific considerations is put together by the lands officer.

5.3 While small surface additions are not subject to the same requirements as normal additions to reserve, the following provides an overview of the major steps involved in the processing, approving and registering of these additions:

- a) **Title:** The lands officer must obtain title documentation from the province or municipality and should complete a Lands Status Report to verify the title of the lands.

- b) **Land Description:** The province or municipality must provide a registerable legal description for the lands to be reviewed and approved by the Regional Surveyor, Natural Resources Canada. A CLSR survey is required. The province or municipality should assume the survey costs.
- c) **Environmental Compliance:** Although only a small parcel of land, the lands officer must ensure that the lands are subjected to an environmental assessment. An environmental clean-up (such as an agreement to remove pavement from the lands), if required, should be done by the province or municipality prior to the transfer of the lands to Canada.
- d) **Land Value:** Given the nature and size/shape of the subject lands, they will typically be of little value. However, an attestation should be completed by the province or municipality to ensure that the appropriate delegated authority executes the FRPFIA acceptance document.
- e) **First Nation Consent:** Consent in the form of a Band Council Resolution.
- f) **Approval in Principle:** The lands officer either prepares a letter for the signature of the Regional Director, Lands and Trust Services (or equivalent position), or, if required by the Regional Director, prepares a full submission to the regional additions to reserve committee to obtain approval in principle.
- g) **Federal Acceptance of the Lands:** The Department of Justice will draft a FRPFIA acceptance document which is executed by the appropriate departmental authority. The FRPFIA acceptance document is then countersigned by the Department of Justice.
- h) **Order in Council Submission:** The lands officer prepares a submission recommending approval of the addition to reserve. The approval in principle letter and the FRPFIA acceptance document are included in the submission package which is forwarded to the Department HQ (see Chapter 13 of this Manual).
- i) **Registration:** Upon approval, the order in council and FRPFIA acceptance document are registered in the Indian Lands Registry and in the Department of Justice's federal real property document depository.

## 6. Implementation:

- 6.1 This Directive takes effect immediately.

# Directive 10-6

## Section 36 - Special Reserves

### 1. Purpose

- 1.1 The purpose of this Directive is to clarify the position of the Department concerning special reserves pursuant to Section 36 of the *Indian Act*.

### 2. Authority

- 2.1 Section 36 of the *Indian Act* states: *Where lands have been set apart for the use and benefit of a band and legal title thereto is not vested in her Majesty, this Act applies as though the lands were a reserve within the meaning of this Act.*

### 3. Policy

- 3.1 Section 36 of the *Indian Act* is of historical importance only, its predecessors having originally been enacted to bring within the authority of the *Indian Act* lands held by churches or charitable organizations in trust for Indian communities in pre-confederation days. Special Reserves were few in number and existed only in four of the original five provinces of Confederation (Quebec having none). Title to all of these lands have since been acquired by Canada and the lands have subsequently been “normalized” into ordinary reserves under the *Indian Act*.
- 3.2 While the continued existence of section 36 in the *Indian Act* points to the continued ability to create further special reserves, no special reserve may be created except with the agreement of the Federal Crown as reserve creation requires the exercise of the Royal Prerogative. A special reserve cannot be created by the unilateral act of a third party.
- 3.3 The Department’s policy is that no special reserves will be created.

### 4. Implementation

- 4.1 This Directive takes effect immediately.



# Directive 10-7

## Joint Reserves

### 1. Purpose

- 1.1 The purpose of this Directive is to set out the minimum requirements for the consideration of joint reserve proposals.

### 2. General

- 2.1 Even though there are currently many reserves which are held by more than one First Nation, our policy today remains one that discourages joint reserves, except under the most compelling circumstances.
- 2.2 The *Indian Act* has no provisions for the governance of a reserve set aside for two or more First Nations or the surrender of reserve land held for the benefit of two or more First Nations. Joint reserve proposals will be considered on case by case basis in light of potential cost implications and other factors associated with the management of a joint reserve .

### 3. Definitions

- 3.1 “**Department**” means Indian and Northern Affairs Canada or the Department of Indian Affairs and Northern Development.
- 3.2 “**Joint reserve**” means a reserve set aside for two or more First Nations.
- 3.3 “**Reserve**” has the meaning set out in the *Indian Act*.

### 4. Objectives

- 4.1 In setting out the policy on joint reserves, the Department’s objectives are to ensure that First Nations contemplating the sharing of a reserve have been made aware of the problems that the Department anticipates they will face with respect to managing that particular parcel of land.

## 5. Authorities

- 5.1 While the *Indian Act* defines a “Reserve”, it does not set out how reserves are created. Lands are granted reserve status under the Crown’s Royal Prerogative (a non-statutory power) by way of an Order in Council (OIC) exercised by the Governor in Council. New legislation for Manitoba, Saskatchewan and Alberta allows the Minister to create reserves in those provinces by Ministerial Order. In the case of a joint reserve, the OIC or Ministerial Order grants reserve status to the land in question and names the First Nations for whose use and benefit the reserve is being created.
- 5.2 The authority for administration of a reserve is derived from the *Indian Act* and regulations respecting activities on a reserve.

## 6. Policy - Approval Process

- 6.1 Proposals for joint reserves raise complex legal and administrative issues that must be addressed. Therefore, the Department must inform all First Nations involved:
- a) in writing, of the anticipated potential problems that may be associated with the proposal;
  - b) that the reserve will be set apart with each of the First Nations receiving an equal undivided interest in the reserve lands regardless of the size; and
  - c) that the First Nations must negotiate a co-management agreement among themselves.
- 6.2 The proposal to create a joint reserve must be put to a vote by the electors of each First Nation involved, with the question decided by a simple majority of the eligible electors of each First Nation.
- 6.3 **Information Session.** At a minimum, one information session must take place for the benefit of the electors of each First Nation before its vote is held. The information session should include all the details of the proposal including, but not limited to, the day-to-day administration, the requirement for unanimity for any decision affecting the use of the land and what that means, etc.
- 6.4 **Separate Votes.** While all the First Nations may vote at the same time, separate voting results must be tabulated for each. This requirement is to ensure that the membership of each First Nation actually supports the joint reserve.
- 6.5 **Failed Votes.** If one or more of the First Nations fail to consent to the joint reserve proposal, the joint reserve will not be created. A second vote must be

held following the same procedure as the first vote. If all of the First Nations do not vote in favour at the second vote, the proposal should be abandoned.

- 6.6 **Legal Obligation.** Where the joint reserve is proposed in partial or full satisfaction of the Department's legal obligations to one or more of the participating First Nations, the proposal must address how the obligation is being satisfied with respect to those First Nations. The end result must lead to the Department's release from any liability.
- 6.7 **Designation.** The Lands Officer should advise all the First Nations that leasing activity will normally require the lands to be designated in accordance with the *Indian Act* or the claims implementation legislation enacted for the prairie provinces. The electors of each First Nation should be advised that a vote in accordance with Chapter 5 of the Manual will be required in order to designate the land for leasing purposes. The First Nations should also be advised that any designation must be approved by every First Nation for whom the joint reserve was set apart and that the failure to obtain the approval of one First Nation will defeat the proposal for all First Nations.
- 6.8 **Indemnity.** The Department will require that all the First Nations agree to indemnify Canada from any claims by any of them or their members pertaining to the use of the land or the division of benefits or losses derived from the joint reserve.

## 7. Implementation

- 7.1 This Directive takes effect immediately.

## INDEX TO CHAPTER 11

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**DIRECTIVE 11-1  
POLICY FOR RLAP AND 53/60  
LAND MANAGEMENT PROGRAMS**

**1.0 Purpose**

1.1 This directive explains the policy and framework for the Regional Land Administration Program (RLAP) and the 53/60 land management program. You should read it as an introduction to this chapter and for information on:

- a) **Policy:** It states those general policies that govern the RLAP and 53/60 land management programs.
- b) **Programs:** It describes the structure of the RLAP and 53/60 land management programs and the various funding programs.

**2.0 General**

2.1 The transfer of control over land management to First Nations is part of an overall departmental approach to facilitating assumption by First Nations of control over their communities. The department's program is made up of four separate components:

- a) Regional Lands Administration Program (RLAP);
- b) Delegated Lands Management Program (53/60);
- c) Self-government agreements negotiated with individual First Nations; and
- d) First Nation Land Management Act (FNLMA).

Only the first two of these components will be discussed in this chapter.

2.2 The four basic principles upon which the RLAP and 53/60 land management programs are based are:

- a) **Primacy of statutory duties and fiduciary obligations:** The department will not pursue the transfer of functions at the expense of performing its statutory duties and fulfilling its fiduciary obligations.
- b) **Clear mutual understanding of the respective accountabilities of the Minister and First Nation:** First Nations have a right to know what they are getting into when they accept responsibility for land management functions.

- c) **Informed Consent:** First Nations will not be pressured into accepting the transfer of land management functions, and they will be given all available information regarding the pros and cons of assuming land management responsibilities.
- d) **Equal access to available resources:** All First Nations participating in RLAP and 53/60 land management programs will be given equal access to resources available within the department.
- 2.3 **The Band Land Management Training program** is aimed at First Nations who wish to assume responsibility for the maintenance of their lands transactions under 53/60 delegation and prepares candidates to become a First Nation Lands Officers or Lands Managers.
- 2.4 The RLAP and 53/60 land management programs enable First Nations to perform a variety of land management activities. There are, however, some major differences between the RLAP and 53/60 programs. Table 1 sets out those differences.

<b>Table 1 Comparison between RLAP and 53/60</b>	
<b>RLAP</b>	<b>53/60</b>
1. Authority to approve transactions remains with the department.	1. First Nations are delegated authority to approve transactions on behalf of the Minister.
2. Must show support for entry into the program by submitting a Band Council Resolution passed by a majority of a quorum of their council at a duly convened meeting.	2. Must show support for entry by obtaining the consent of the majority of electors participating in process (s. 53) or a majority of a majority of all eligible electors (s. 60 or both s. 53 and 60). <b>See Directive 11.03 for more detail.</b>
3. <b>Entry criteria</b> are less stringent <b>See Directive 11.02 for more detail.</b>	3. <b>Entry criteria</b> are more stringent.
4. First Nations are authorized to deliver only a limited number of <b>services.</b>	4. First Nation authority to deliver <b>services</b> is enhanced.

Table 1 Comparison between RLAP and 53/60 (continued)	
RLAP	53/60
5. <b>Funding</b> provided by the department is limited.	5. <b>Funding</b> is more comprehensive.
6. <b>Administration</b> of the program is relatively simple and there are fewer terms and conditions for the First Nation to comply with.	6. <b>Administration</b> of the program is more complex and the First Nation must meet more onerous terms and conditions to remain in the program.
7. <b>Authority</b> for the program comes from Treasury Board.	7. <b>Authority</b> for the program comes from the <i>Indian Act</i> and funding is approved by Treasury Board.

### 3.0 Authorities

3.1 Treasury Board has granted authorities for the following programs:

- a) The 53/60 Program was granted authority in 1983 and last revised in 1996. It is subject to periodic renewal.
- b) The RLAP Program was granted authority in 1994 subject to periodic renewal of authority.
- c) The Band Land Management Training Program was established under a 1991 Treasury Board authority.

3.2 First Nations are authorized to exercise delegated land management authorities under the following sections of the *Indian Act*:

53. (1) *The Minister or a person appointed by the Minister for the purpose may, in accordance with this Act and the terms of the absolute or surrender or designation, as the case may be,*
- (a) *manage or sell absolutely or surrendered lands; or*
  - (b) *manage, lease or carry out any other transaction affecting designated lands.*
60. (1) *The Governor in Council may at the request of a band grant to the band the right to exercise such control and management over lands in the reserve occupied by the band as the Governor in Council considers desirable.*
- (2) *The Governor in Council may at any time withdraw from a band a right conferred on the band under subsection (1). R.S. 1970, c. I-6, s. 60.*

## Policy: The Regional Land Administration Program (RLAP)

- 3.3 **Entry Criteria:** First Nations seeking to participate in the RLAP Program must meet the following criteria:
- a) The First Nation must submit a Band Council Resolution expressing its desire to participate in the program and its willingness to comply with program terms and conditions.
  - b) The First Nation must have made arrangements for the hiring or training of a qualified land manager.
  - c) The First Nation must have made arrangements for acquiring adequate land management records and systems.
  - d) The First Nation must have a significant history of good financial management and audits. Those First Nations that are allowed entry into the program on the condition that they upgrade their financial systems must do so within twelve months of entering the program.
- 3.4 **Services:** Under the RLAP program, the department provides funding to First Nations to perform the following services:
- a) Provide information to members and third parties about the status of their lands and issues related to the granting, alteration, transfer or alienation of interests in those lands.
  - b) Provide the department with input and advice about the views of the First Nation in matters relating to the management of their lands under the *Indian Act*. An example would be participating in lease negotiations.
  - c) Liaise with the department, members and third parties such as utilities to resolve issues relating to the management of its lands under the *Indian Act*. An example would be participating in discussions regarding the maintenance of reserve boundaries.
  - d) Inspect reserve boundaries and lease and permit sites to identify encroachments or violations of the terms of a lease or permit. This includes advising the department of any violations as soon as possible. An example would be inspecting a stream on a leasehold to make sure the water is not being diverted.
  - e) Other site specific functions such as supporting or assisting survey work, resource inventories or environmental audits.



- 3.5 **Funding:** The RLAP Program is funded using a transaction-based formula. Program funding is 80% of a base amount based on eligible transactions in place as of the previous December 31st. For more information on funding for the RLAP program, please refer to "***An Executive's Guide to the Land Management Funding Formula***" Indian and Northern Affairs Canada, 1994 at Appendix A to this chapter.
- 3.6 The terms and conditions for the RLAP Program are spelled out in the funding arrangement between the department and the First Nation. The major terms and conditions are as follows:
- a) The First Nation must continue to meet all of the entry criteria for the program.
  - b) First Nations must deliver the services for which they are funded according to departmental policy.
  - c) Each year, the First Nation must provide the department with an estimate of funding requirements and annual reports in July and a funding application in January of each year.
- 3.7 The department will provide training, advice, funding and access to selected tools and records in accordance with the funding arrangement and this manual. Where necessary, remedial action will be taken as set out in the terms and conditions of the funding arrangement and departmental policy.

### **Policy: The Delegated Lands Management Program (53/60)**

- 3.8 **Entry Criteria:** First Nations seeking to participate in the 53/60 Program must do the following:
- a) Obtain the informed consent of the ***majority of electors participating*** in a vote on the question. For section 60 delegations they must obtain a ***majority of a majority of all eligible electors*** (See Directive 11-03).
  - b) Submit a Band Council Resolution expressing their desire to participate in the program and its willingness to comply with program terms and conditions.
  - c) Make arrangements for the hiring of a qualified land manager.
  - d) Make arrangements for acquiring adequate land management records and systems.

- e) Have a significant history of good financial management and audits.
  - f) Have authority under s. 69 of the *Indian Act*.
- 3.9 **Services:** Under the 53/60 program, the department provides funding to First Nations to perform the following services:
- a) Provide information to members and third parties.
  - b) Represent the First Nation and the department in dealings with third parties and other federal agencies regarding the management of First Nation lands under the *Indian Act*.
  - c) Negotiate, draft, finalize, execute and register leases and permits.
  - d) Inspect reserve boundaries and lease and permit sites to identify encroachments or violations of the terms of a lease or permit and monitor compliance with non-site related terms such as insurance and payment of rent.
  - e) Carry out specified Crown obligations under a lease or permit. This includes approving mortgages and subleases and conducting rent reviews.
  - f) Approving actions under the *Indian Act* relating to the granting, transfer and expiration of individual interests in First Nation lands.
  - g) Other Services may include issuing allotments, setting aside lands under Section 18(2) of the *Indian Act* and supporting the department in relation to designations.
- 3.10 **Funding:** The 53/60 Program is funded using a transaction-based formula. Program funding is 27% of a base amount based on eligible transactions in place as of the previous December 31st. For more information on funding for the 53/60 program, please refer to "***An Executive's Guide to the Land Management Funding Formula***" Indian and Northern Affairs Canada, 1994 at Appendix A to this chapter.
- 3.11 **Terms and Conditions:** The terms and conditions for the 53/60 Program are also spelled out in the funding arrangement between the department and the First Nation. The major terms and conditions are:
- a) The First Nation must continue to meet all of the entry criteria for the program.

- b) First Nations must deliver the services, for which they are funded, in accordance with all relevant Federal legislation and regulations and Departmental policies and procedures.
  - c) The First Nation must provide the department with an estimate of funding requirements and annual reports in July and a funding application in January of each year.
- 3.12 The department will provide training, advice, funding and access to selected tools and records in accordance with the funding arrangement and this manual. Regions must monitor the transfer of land management functions by reviewing First Nation reports and conducting site reviews of the First Nation's land management operation at least once every three years. Where necessary, remedial action will be taken according to the terms and conditions of the funding arrangement and departmental policy.
- 3.13 All first Nations entering the Delegation Program are required to assume delegated authority under section 60 of the *Indian Act*. Delegations under section 60 authorize First Nations to exercise the following land management functions:
- a) **Subsection 18(2):** Authority to set aside reserve lands for Indian schools, burial grounds, health projects or other purposes for the general health and welfare of the band.
  - b) **Subsections 20(1), (2), (4), (5) and (6):** Authorities relating to the allotment of reserve lands to First Nation members and the issuance of certificates of possession.
  - c) **Section 24:** Authority to approve transfers of land from First Nation members to other members or to the First Nation.
  - d) **Subsection 25(1):** Authority to extend the time limit for disposition of reserve lands by those no longer entitled to reside on reserve.
  - e) **Subsection 28(2):** Authority to issue permits for the use of reserve land.
  - f) **Subsection 58(1)(b):** Authority to lease uncultivated allotted reserve land for agricultural or grazing purposes or for any purpose that is for the benefit of the locatee.
  - g) **Subsection 58(1)(c):** Authority to lease uncultivated unallotted reserve land for agricultural or grazing purposes.
  - h) **Subsection 58(3):** Authority to lease allotted reserve land for the benefit of the locatee.

- i) **Subsection 58(4):** Authority to dispose of dead grass, fallen timber, sand, clay, gravel and other nonmetallic materials on reserve land.
- 3.14 All First Nations with designated lands entering the delegation program are required to assume delegated authorities under section 53 of the *Indian Act*. However, the scope of such delegations may be limited so as to exclude responsibilities for disputes and other issues arising from the department's administration of designated lands prior to the date of the delegation.

#### 4.0 Process

- 4.1 Processes related to the management and operation of RLAP and 53/60 land management programs are described in the following directives:
- a) **Directive 11-02, Entry:** This describes processes relating to the entry of First Nations into RLAP and 53/60 land management programs.
  - b) **Directive 11-03, Consent:** The directive outlines the process for obtaining consent of a majority of eligible electors for a delegation under sections 53 or 60 of the *Indian Act*.
  - c) **Directive 11-04, Administration:** This directive describes processes relating to the funding and operation of services under the RLAP and 53/60 land management programs.
  - d) **Directive 11-05, Monitoring and Remedial Action:** Outlines procedures governing the monitoring of First Nation operations under these programs and for taking remedial action where required.

#### 5.0 References

- 5.1 Those interested in obtaining more information on the RLAP and 53/60 land management programs may wish to consult one or more of the following sources. All of these are available through the information number listed on the cover of this chapter or the local office of Indian and Northern Affairs Canada.
- a) ***Just the Facts!***, Lands and Environment Branch, Indian & Northern Affairs Canada, 1995. This is a short booklet which gives basic information about these programs in question and answer form.
  - b) ***Land Management Devolution Workshop Participants Manual***, Human Resources Branch, Indian & Northern Affairs Canada, 1995. This manual contains extensive, detailed information about departmental RLAP and 53/60 land management programs. It is only available to or from participants in one of the Department's Land Management Devolution Workshops.

- c) ***Land Management Devolution Programs Series*** (four Pamphlets), Manitoba Region, Indian & Northern Affairs Canada, 1995. This is a series of four pamphlets entitled: *Understanding Land Management*, *Options for First Nations*, *The Application and Funding Formula* and *An Outline of Delegated Authorities*. It is most useful for those just starting to find out about RLAP and 53/60 land management programs.

## DIRECTIVE 11-2 ENTRY CRITERIA AND PROCESSES

### 1.0 Purpose

1.1 This directive explains the entry requirements for the RLAP and 53/60 programs. In this directive you will find the following information:

- a) **Policy:** The principles and requirements that underlie entry into these programs.
- b) **Process:** The steps and procedures involved in turning over land management authorities.

### 2.0 General

2.1 If you are not familiar with the department's RLAP and 53/60 land management policies and programs, please read Directive 11-01 in this chapter before reading this directive.

### 3.0 Policy

3.1 First Nations seeking to enter the RLAP or 53/60 land management programs must meet all of the following criteria. The differences between the RLAP and 53/60 entry criteria are set out in Table 1.

- a) There must be a qualified land manager.
- b) There must be a complete and indexed set of plans, documents and records relating to First Nation reserve and designated lands.
- c) There must be systems in place for identifying and monitoring lessee and permittee compliance with the terms and conditions of all active leases and permits.
- d) The First Nation must be in a sound financial position and have adequate financial management systems. Normally, financially sound means the working capital deficit does not exceed 8% of the budget.
- e) The First Nation must show support of its members for the decision to participate in the chosen land management program.

<b>Table 1</b>	
<b>Comparison between RLAP and 53/60 Entry Criteria</b>	
<b>RLAP</b>	<b>53/60</b>
<ol style="list-style-type: none"> <li>1. The qualified land manager may be a trainee.</li> <li>2. The First Nation must be financially sound and have adequate financial management systems in place. If no such systems are in place or there is a serious working capital deficit, there must be a plan to upgrade the systems and that plan must have been in place and working for at least six months.</li> <li>3. To show support for participation, the First Nation must submit a Band Council Resolution passed by a majority of a quorum of their council at a duly convened meeting.</li> <li>4. First Nations with a land management trainee or a plan to upgrade the land management system must agree to have a fully qualified manager and land management system in place within two years.</li> </ol>	<ol style="list-style-type: none"> <li>1. The land manager must be fully qualified according to the criteria set out in paragraph 04 of this directive.</li> <li>2. The First Nation must be financially sound and have received unqualified audits or audits with only minor qualifications in each of the last two years. This must be certified by the responsible Funding Services Officer.</li> <li>3. The First Nation must submit documents confirming that it has obtained consent from an absolute majority of electors for the proposed delegation. (See Directive 11-03)</li> <li>4. The First Nation must submit plans for ensuring that the delegated authorities continue to be exercised by a qualified individual in the event that the land manager's position becomes vacant. These may include training a backup candidate, employing a contractor, sharing the services of another First Nation land manager or other acceptable arrangement.</li> </ol>

3.2 **Qualified Land Manager:** To be a qualified land manager the candidate must meet **one** of the following combinations of requirements:

- a) Candidates with a designation, degree or certificate in property management, appraisal, law or any other field relating to land management who have successfully passed the written exams used for land management officers who have completed the land management orientation and workshops.
- b) Candidates who have had at least two years experience as a First Nation land manager or departmental land management officer.

- c) Candidates who have successfully completed the department's First Nation Land Management Training Program.

**Note: Candidates who have been accepted into but have not yet completed the department's First Nation Land Management Training Program (trainees) are considered qualified only for the purposes of entry *into the RLAP program.***

**3.3 Land Management Records:** To meet the requirement for adequate land management records, the First Nation must have:

- a) Copies of all current plans and documents relating to its reserve or designated lands together with all records concerning the status of those lands.
- b) An index system that specifies the nature, location and subject matter for all lands records and is cross-referenced to the department's Indian Land Registry.
- c) A storage system for all land management records including documents and/or electronic files that is secure from fire and water damage and from theft or tampering.
- d) A manual or guide document explaining the nature and structure of the system and how it is operated and maintained.

**3.4 Land Management Systems:** To meet the requirement for adequate land management systems a First Nation must have:

- a) A system for identifying, checking and reporting on all of the requirements included in the leases and permits issued for its reserve and designated lands. This system must include reminders and checklists for rent payments, rent reviews, environmental conditions, structures and the purposes for which the land is used.
- b) A system for identifying, tracking and recording all payments owing under any lease or permit issued for its reserve and designated lands.
- c) A set of instructions regarding the management and operation of the land management area within the First Nation.

**3.5 First Nation Council Resolution (BCR):** The resolution for entry into the **RLAP** program must confirm the First Nation's intention to enter the program and formally commit it to complying with the most important program conditions. The resolution for entry into the **53/60** program must specify the following:



- a) Whether the First Nation is seeking delegation under section 60 or under both sections 53 and 60;
- b) An undertaking that it will meet the eligibility criteria;
- c) An undertaking to appoint a qualified land manager;
- d) An undertaking that all delegated authorities will be exercised only with the approval of a majority of the First Nation Council and that such approval is acknowledgement that the action will be in the best interests of the First Nation;
- e) An undertaking to enact and observe appropriate conflict of interest guidelines;
- f) An indemnification of the department from causes of action arising from the improper exercise of the delegated authorities;
- g) An undertaking to comply with all relevant departmental policies and procedures governing the exercise of the delegated authorities;
- h) An undertaking to maintain appropriate accounting records relating to leases, permits and related land transactions;
- i) Permission for the department to conduct on-site reviews of the exercise of all delegated land management authorities;
- j) Acknowledgement of the department's right to have access to and review the land management records kept by the First Nation;
- k) An undertaking to obtain departmental approval for the form and content of all instruments issued in the exercise of the delegated authorities;
- l) An undertaking to obtain prior approval from the department for any action to recover overdue monies;
- m) Acknowledgement that the delegated authorities specifically exclude the authority to cancel leases or permits;
- n) An undertaking to refrain from taking any action and to advise the department whenever a breach or default occurs;
- o) An undertaking to include a clause requiring periodic rent reviews in all leases or permits with a term of five or more years;

- p) An undertaking to deliver all of the services related to its delegated authorities through a qualified land manager according to all the department's land management policies.

A sample of this resolution may be found at Annex B to this directive.

- 3.6 Applications from First Nations that had previously participated in a land management delegation program are to be treated as new applications. The department will only approve those applications where it can verify that the First Nation meets all of the eligibility criteria.
- 3.7 Delegations to First Nations continue in force even after a First Nation has withdrawn from the RLAP or 53/60 program. When a First Nation applies for reentry, the department must verify whether its previous delegation is still in force. Previous delegations will continue in force until one of the following occurs:
  - a) Where a delegation was for a specific period that has since expired or to a position or individual which no longer exists, it should be considered expired. First Nations with expired delegations must obtain new delegations. This will also entail obtaining a new consent from an absolute majority of eligible electors for 53/60 delegations; or,
  - b) Where a delegation was withdrawn or cancelled by the Minister or Governor in Council, it should be considered revoked. First Nations with revoked delegations must obtain new delegations. This will also entail obtaining a new consent from an absolute majority of eligible electors for 53/60 delegations.
- 3.8 Where a delegation was **temporarily** withdrawn or cancelled by the department, it should be considered suspended. **A new delegation will not be required.** However, the department must issue a letter formally ending the suspension. This should only be done once the application has been verified and approved.

#### 4.0 Process

- 4.1 **Information to First Nations:** First Nations must be provided with sufficient information to allow them to decide whether to apply for a land management program. This normally takes the form of a meeting or workshop initiated by the department or the First Nation. The department will normally send out an information package with up-to-date materials on the program including an estimate of the funding for which the First Nation would be eligible. The First Nation representative(s) responsible for entry into the program should attend a departmental training session dealing with the program funding formulas and the completion of the application for entry.

- 4.2 **Stage 1 – Application Stage:** First Nations interested in participating in the RLAP or 53/60 program must submit a complete application for entry on departmental Forms 1 and 2 as described in Appendix A to this chapter. The application package must also include:
- a) Identification of a qualified land manager or land manager in training (RLAP). Consequently, the First Nation Council must name an individual who will assume this position.
  - b) Proof of having met the requirements for adequate land management records and systems as set out in sections 3.1 to 3.4 of this directive.
  - c) A Band Council Resolution following the requirements set out in section 3.5 of this directive.
  - d) Data regarding the types, numbers, registration dates and expiry dates for leases, permits and allotments on reserve and designated lands. This data may either be submitted on Form 2 or in a printout or report. Detailed guidelines on substantiating data are included in Appendix A to this chapter, “*An Executive’s Guide to the Land Management Funding Formula.*”

**Note:** In addition, applications for 53/60 delegations must include:

- e) Evidence that the First Nation has received delegated authority under section 69 of the *Indian Act* (concerning revenue moneys); and,
  - f) Evidence that the First Nation has obtained the consent of a majority of eligible electors (see Directive 11-03).
- 4.3 **Stage 2 – Processing/Verifying the Application:** Normally, the department will need at least ten months advance notice to ensure that the required funding can be identified in its next budget. Consequently, First Nations wishing to enter a program effective April 1st of a given year should submit their completed applications to the department by June 1st of the preceding year. Processing and verifying the application will include the following steps:
- a) The department must verify that the First Nation meets all of the eligibility criteria. Funding services will verify financial management criteria while lands staff will conduct site reviews to verify that appropriate systems and records are in place.

Authorized **departmental staff approves** the application and authorizes funding for the First Nation. Where funds are not available, approvals continue to be valid and are a priority claim on any additional funds that may become available for the relevant program.

- b) When an application for the **53/60** delegation program is approved, **regional staff must prepare the delegation instruments** and obtain the necessary recommendations and approvals.
- c) The funding calculations and substantiating data must be reviewed to ensure that all of the data are correct and that requirements outlined in *“An Executive’s Guide (Appendix A) have been met.*
- d) The land management records and systems in place at the First Nation offices must be reviewed.
- e) The appropriate Funding Services Officer must certify that the First Nation meets the financial management requirements.

4.4 **Stage 3 – Approval and Funding:** The purpose of this stage is to formally approve the entry of First Nations into a program and arrange for appropriate funding. It involves the following steps:

- a) The region prepares a letter from the Regional Director General to the Director General, Lands and Environment recommending entry of the First Nation into the program.
- b) The headquarters land management officer confirms that the application package is complete and correct. Tests must also be conducted to verify that all of the regional reviews have been completed.
- c) The headquarters land management officer verifies that there are sufficient funds in the program budget to fund the First Nation in the specified year.
- d) Based on the recommendations of district, regional and headquarters lands officers, the Director, Lands recommends approval of the First Nation’s application to the Director General, Lands and Environment.
- e) The Director General, Lands and Environment signs a letter to the Regional Director General approving the First Nation’s application for entry into the program.
- f) If entry is effective in a future year, the Director General, Lands and Environment requests the Finance Branch to include sufficient funding in the program budget to fund the approved application.
- g) If entry is effective in the current year, the Director General requests the Finance Branch to transfer sufficient funds to the region to fund the approved application for the rest of the fiscal year.

- 4.5 **Delegation Instruments:** The regional office is responsible for drafting the Order in Council delegating land management authority to the First Nation under section 60 of the *Indian Act*. It is also responsible for drafting the Ministerial letter delegating land management authority to the First Nation's designate under Section 53 of the *Indian Act*. Finally, it is responsible for making the recommendation in the form of a letter to the Regional Director General. The delegations of land management authorities are to be made using the following forms and instruments:
- a) Delegations under Section 53 of the *Indian Act* are to be made in the form of a letter from the Minister to the Chief and Council of the First Nation.
  - b) Delegations under Section 60 of the *Indian Act* are to be made in the form of an Order in Council.
- 4.6 All land management delegation instruments must state:
- a) The First Nation's authority is either Section 53 or Section 60 of the *Indian Act*;
  - b) The legal title of the First Nation in the case of Section 60 and the Council of the First Nation in the case of Section 53;
  - c) A statement certifying that the First Nation meets the eligibility criteria of the program;
  - d) A recital of the authorities being delegated;
  - e) A recital of the terms of delegation as described in the Band Council Resolution or a statement that the Resolution is attached and that the terms form part of the delegation; and,
  - f) A statement that the delegation may be suspended or revoked by the issuing authority at any time. In the case of delegations under section 60, this should also state that the Minister may suspend the delegation without reference to the Governor General In Council.
- 4.7 Once the delegation instruments have been drafted, they must undergo the following process:
- a) They must be submitted to Headquarters with a regional letter of recommendation;
  - b) A Land Management Officer from Headquarters reviews the delegation instruments to ensure that they meet all of the requirements;

- c) The Finance Branch reviews the proposed order and privy council submission relative to the requirements governing the form and format of such submissions. ***(This applies only to Orders in Council)***;
- d) The delegation instruments are reviewed and recommended by HQ;
- e) Ministerial letters and privy council submissions are signed by the Minister. Orders in Council are approved by the Governor General in Council.

## 5.0 Implementation

- 5.1 First Nations approved for entry into a program are advised by the region and subsequently receive the appropriate funding. First Nations entering the delegation program are also issued copies of their delegation instruments. Once the funding arrangements have been signed and the delegation instruments issued, First Nations are responsible for providing the land management services according to the terms of the funding arrangement and delegation instruments.
- 5.2 This policy is effective immediately.

**ANNEX A  
PROCESS CHECKLIST FOR ENTRY INTO  
LAND MANAGEMENT PROGRAMS**

The following steps should be taken by the organization/individual indicated:

1	<b>First Nation:</b> Sends a request for information to district or region.	
2	<b>INAC Field:</b> Estimates funding and sends information package explaining:  a) Programs available, authorities which can be delegated and functions which can be performed b) Entry criteria c) Terms and conditions d) Funding formula	
3	Meets with First Nation and answers questions.	
4	Advises headquarters of interest and potential funding need.	
5	<b>INAC Headquarters:</b> Updates records and projections of First Nation Participation and costs.	
6	Updates status report for transfer of functions.	
7	Distributes updated status report July 15th, January 15th and as required.	
8	<b>First Nation:</b> Decides to apply for the delegation or administration program.	
9	Sends responsible individual to training session for program funding formulas and the completion of the application for entry.	
10	Reviews, records and lists registered interests eligible for funding as of December 31 of previous year.	
11	Completes Form 2 or prepares a list of eligible interests for each funding category showing:  a) Registration numbers b) Type of interest (Lease, Sublease, Headlease, Permit, Individual holding) c) Type of Activity (Residential, Retail, Industrial, Mobile home, Agricultural) d) Date of Expiry  Where development funding is being requested:  a) Date of Registration	

12	<p>Verifies compliance with entry criteria:</p> <ul style="list-style-type: none"> <li>a) Qualified land manager or suitable trainee</li> <li>b) Adequate land management records and systems</li> <li>c) Sound financial status and last 2 audits acceptable</li> </ul> <p>Where entry into 53/60 program is being requested:</p> <ul style="list-style-type: none"> <li>a) Authority under section 69 of the Act</li> <li>b) Process to obtain consent established and acceptable</li> </ul>	
13	<p>Completes an application for entry and funding on Form 1, relying on:</p> <ul style="list-style-type: none"> <li>a) <i>The Executive's Guide to the Land Management Funding Formula</i></li> <li>b) The completed Form 2 or printout from Step 11</li> <li>c) Information regarding entry criteria from Step 12</li> </ul>	
14	<p>A quorum of council passes a First Nation Council Resolution according to Paragraph 08 of Directive 11-02.</p>	
15	<p>Obtains consent of a majority of eligible electors (<b><i>For Section 60 delegations only</i></b>).</p>	
16	<p>Submits a completed application package to INAC regional or district office including:</p> <ul style="list-style-type: none"> <li>a) A duly passed BCR</li> <li>b) A completed Form 1</li> <li>c) A completed Form 2 or other supporting data</li> <li>d) Evidence of support of majority of eligible electors (<b>Section 60 only</b>)</li> </ul>	
17	<p><b>INAC Field</b> Verifies the application package to ensure it is complete.</p>	
18	<p>Checks BCR to verify that it:</p> <ul style="list-style-type: none"> <li>a) Contains all the elements listed under Paragraph 08 of Directive 11-02</li> <li>b) Was duly passed by a quorum of council</li> </ul>	
19	<p>Checks information on Form 1 to verify:</p> <ul style="list-style-type: none"> <li>a) All information provided is accurate</li> <li>b) All calculations are correct</li> <li>c) The numbers of interests shown correspond to the list of registered interests</li> </ul>	
20	<p>Checks the list of registered interests to verify that:</p> <ul style="list-style-type: none"> <li>a) All interests are fundable at the rate shown on Form 1</li> <li>b) There are no duplicate numbers</li> <li>c) There are no expired numbers</li> </ul>	



21	<p>Checks the qualifications of the land manager.</p> <p>For RLAP this is done by verifying that the proposed individual:</p> <ul style="list-style-type: none"> <li>a) Is eligible for training, and</li> <li>b) Has not been funded for training in the past</li> </ul> <p>For 53/60 this is done by verifying:</p> <ul style="list-style-type: none"> <li>a) The land manager has completed the First Nation Land Management Training Program; or,</li> <li>b) Met other qualifying criteria set out in Paragraph 05 of Directive 11-02</li> </ul>	
22	<p>Checks the financial status of the First Nation by having the Funding Services Officer or other appropriate regional official certify that the First Nation:</p> <ul style="list-style-type: none"> <li>a) Has received an unqualified audit opinion or only minor qualifications in each of the last 2 years, and</li> <li>b) Is free of any requirement for a financial management or remedial action plan</li> </ul>	
23	<p>Visits the site where the delegated authority will be exercised to verify:</p> <ul style="list-style-type: none"> <li>a) Adequate records are in place</li> <li>b) Adequate land management systems are in place</li> <li>c) Adequate records and systems for the management and administration of revenues are in place</li> </ul>	
24	<p>Completes and signs part 9 of Form 1.</p>	
25	<p>Forwards the entry package to headquarters with a letter from the Regional Director General certifying that the First Nation meets the entry criteria and recommending approval of their application.</p>	
26	<p><b>INAC Headquarters:</b> When it receives the entry package from INAC Field, verifies:</p> <ul style="list-style-type: none"> <li>a) All necessary documents are included (see item 16)</li> <li>b) The data and funding calculations are correct</li> <li>c) Part 9 of Form 1 has been completed and signed</li> <li>d) The region has certified eligibility and recommended entry</li> </ul>	
27	<p>Checks the directorate transfer of functions report to see if the band is listed and adds any already not included.</p>	
28	<p>Checks the report to determine if the application can be funded in the current year.</p>	
29	<p><b>For Section 60 delegations:</b> Drafts a privy council submission under Section 60 of the <i>Indian Act</i> which includes:</p> <ul style="list-style-type: none"> <li>a) A preamble</li> <li>b) A declaration</li> </ul>	

30	<p>Drafts schedule to privy council submission which includes:</p> <ul style="list-style-type: none"> <li>a) Definitions of <i>Indian Act</i>, band, council, minister and reserve</li> <li>b) Descriptions of each authority being delegated and the corresponding sections of the <i>Indian Act</i></li> <li>c) A stipulation that agreements entered into prior to the delegation are included in the delegation</li> <li>d) An enumeration of the terms of delegation as described in the BCR</li> <li>e) A stipulation all authorities will be exercised through majority vote of the First Nation council</li> <li>f) A stipulation the land manager or alternate can exercise signing authority under the delegation</li> </ul>	
31	<p>Drafts a covering letter and background note for the submission which at a minimum contain:</p> <ul style="list-style-type: none"> <li>a) <b>Request:</b> An explanation of the order being requested</li> <li>b) <b>Explanation:</b> Background information regarding the First Nation and the request</li> </ul>	
32	<p>Completes departmental form 522(9-92), Executive Summary – Governor in Council Submission, setting out:</p> <ul style="list-style-type: none"> <li>a) Additional funding to be provided as a result of delegation</li> <li>b) A description of the request</li> <li>c) Background information regarding the nature of the delegation and the specific First Nation</li> </ul>	
33	<p>Prepares a submission package which contains:</p> <ul style="list-style-type: none"> <li>a) Draft submission contained in step 29</li> <li>b) Draft schedule as described in step 30</li> <li>c) Draft letter and background note described in step 31</li> <li>d) Completed Executive Summary form described in step 32</li> <li>e) Letter from RDG requesting a delegation under Section 60 of the <i>Indian Act</i></li> </ul>	
34	<p>Coordinates review of the draft submission with Region, Finance and INAC Justice.</p>	
35	<p>Arranges for translation of final draft.</p>	
36	<p>Prepares final submission which includes:</p> <ul style="list-style-type: none"> <li>a) The translated submission</li> <li>b) The BCR described in Paragraph 08 Directive 11-02</li> <li>c) Evidence that consent of all eligible voters was obtained</li> <li>d) A copy of the order granting authority under Section 69 of the <i>Indian Act</i></li> </ul>	

37	<p>Routes submission for sign-off by:</p> <ul style="list-style-type: none"> <li>a) Director General, Lands and Environment</li> <li>b) Department of Justice</li> <li>c) Director General, Finance Branch</li> <li>d) Assistant Deputy Minister, Lands and Trust Services</li> <li>e) Associate Deputy Minister, Indian Affairs and Northern Development</li> <li>f) Minister, Indian Affairs and Northern Development</li> </ul>	
38	<p><b>For Section 53 delegations:</b>          Drafts a letter of delegation in consultation with Justice for signature by the Minister specifying:</p> <ul style="list-style-type: none"> <li>a) The authorities to be delegated</li> <li>b) The terms and conditions of delegation</li> <li>c) The position(s) and First Nation to which delegation applies</li> <li>d) The terms and conditions of entry and participation</li> <li>e) The amount, terms, conditions and start date for program funding</li> <li>f) The entry criteria for obtaining a delegation under the <i>Indian Act</i></li> </ul>	
39	<p>Prepares a final delegation package which includes:</p> <ul style="list-style-type: none"> <li>a) The final letter</li> <li>b) The BCR described in Paragraph 08 in Directive 11-02</li> <li>c) A copy of the order granting authority under Section 69 of the <i>Indian Act</i></li> <li>d) Proof that the First Nation has obtained consent of a majority of eligible electors</li> </ul>	
40	<p>Routes the package for approval and sign-off by:</p> <ul style="list-style-type: none"> <li>a) Director General, Lands and Environment</li> <li>b) Assistant Deputy Minister, Lands and Trust services</li> <li>c) Associate Deputy Minister, Indian Affairs and Northern Development</li> <li>d) Minister, Indian Affairs and Northern Development</li> </ul>	
41	<p>Forwards delegation letter to First Nation with copy to the field.</p>	
42	<p><b>For applications where no delegation is requested or consent is not yet obtained:</b>          Prepares a letter for signature by Director General, Lands and Environment, specifying:</p> <ul style="list-style-type: none"> <li>a) The terms and conditions of entry and participation</li> <li>b) The amount, terms, conditions and start date for program funding</li> <li>c) The entry criteria for obtaining a delegation under the <i>Indian Act</i></li> </ul>	
43	<p>Forwards letter to First Nation with a copy to HQ Finance and region.</p>	
44	<p>Includes funding for the applicant in Multi-Year Operational Plan.  <b>(See MYOP Submission)</b></p>	

45	<b>INAC Field:</b> Reviews delegation instrument and/or letter of approval from HQ to identify:  a) The decision rationale b) Action to be taken by First Nation such as obtaining electors' consent for delegation c) Special implementation issues	
46	Assists First Nation in interpreting and meeting conditions imposed by delegation or approval.	
47	Arranges for funding if applicable. (See <b>Annual Budgets</b> )	
48	<b>First Nation:</b> Reviews delegation instrument and/or letter of approval and determines further action required.	
49	Prepares an implementation plan.	
50	Prepares a cashflow plan if applicable. (See <b>Funding Management</b> )	

**ANNEX B**  
**SAMPLE FIRST NATION COUNCIL RESOLUTION (BCR)**  
**FOR ENTRY INTO THE 53/60 PROGRAM**

**REQUEST BY THE \_\_\_\_\_ BAND OF INDIANS**

**RE: SUBSECTION 53(1) OF THE *INDIAN ACT***

WHEREAS subsection 53(1) of the *Indian Act* provides that:

The Minister or a person appointed by the Minister for the purpose may, in accordance with this Act and the terms of the absolute surrender or designation, as the case may be,

(a) manage or sell absolutely surrendered lands;

or

(b) manage, lease or carry out any other transaction affecting designated lands.

RESOLVED that the Minister of Indian Affairs and Northern Development be requested to appoint (name of person appointed — usually the Chief and Councillors of the First Nation from time to time) to manage, in accordance with the *Indian Act* and the terms of the designation, the lands in the (specify the Indian Reserve No.) that either have been or will be hereafter designated.

RESOLVED that the powers delegated to (name of person appointed) under this Request may not be exercised with respect to lands absolutely surrendered.

RESOLVED that the authority delegated pursuant to Section 53 includes the authority to execute and approve such leases, permits, assignments, mortgages of leasehold interests, relinquishments, licenses of occupation and other similar documents and instruments, as may be reasonably necessary to the proper exercise of the delegated authority, subject, in each case, to the prior approval of a majority of the Chief and Councillors of the First Nation present at a meeting of the Council duly convened for that purpose.

RESOLVED that (specify (a) person(s) appointed by the Council of the First Nation — usually the Land Manager) is authorized to execute documents duly approved by the (name of the person appointed).

RESOLVED that (name of person appointed) may not, except with the prior approval of the Minister of Indian Affairs and Northern Development, acquire directly or indirectly any interest in the designated lands.

RESOLVED that approval of any document or instrument by (name of person appointed) shall constitute an acknowledgment that the document or instrument is in the best interests of the First Nation.

RESOLVED that the Minister be indemnified from and against any and all causes of action arising from the improper exercise of the delegated authority by (name of the person appointed) or any authorized agent thereof.

RESOLVED that the exercise of the delegated authority by (name of person appointed) shall be in accordance with all relevant departmental policies and procedures in force from time to time, including, without limiting the generality of the foregoing, all policies related to conflicts of interest.

RESOLVED that the (name of person appointed) shall keep accounting records for leases and permits entered into, rentals received, receivable and overdue; shall be responsible for collecting rentals under routine collection procedures; and shall submit quarterly a detailed aged listing of rentals receivable and collection action taken to the Regional Director, Lands, Revenues and Trusts.

RESOLVED that (name of person appointed) shall establish and maintain a land management records system satisfactory to the Minister.

RESOLVED that an independent auditor be retained to conduct an annual financial audit of all financial matters relating to the exercise of the delegated authority in accordance with audit guidelines issued by the department from time to time, and that a copy of the financial audit be made available for inspection by members of the First Nation.

RESOLVED that the Minister may, at any time during the term of the delegated authority, conduct an on-site review of all documents, records and other systems such as will enable the said Minister to ascertain that the delegated authority is being exercised in accordance with the terms of this Request.

RESOLVED that (name of person appointed) shall make available to the First Nation and a designated officer of the Minister all records, financial statements, audits and other information to enable the Minister to monitor the exercise of the authority delegated to that person.

RESOLVED that the Financial Plan annexed hereto is an accurate reflection of the annual cash flow requirements on a monthly basis and that the agreed-upon level of funding will only be expended on matters directly related to the exercise of the delegated authority.

RESOLVED that the form and terms of all documents or instruments executed pursuant to the delegated authority shall be pre-approved by the Department of Indian Affairs and Northern Development.

RESOLVED that duplicate originals of all documents executed pursuant to the delegated authority will be forwarded to Ottawa for registration in the Indian Lands Registry.

RESOLVED that the exercise of the delegated authority will be subject to the same pre-audit requirements that apply to the (specify the regional/district office) from time to time.

RESOLVED that action to recover overdue lease or permit monies may not be instituted without the prior approval of the Minister of Indian Affairs and Northern Development on the advice of the Department of Justice.

RESOLVED that the delegated authority does not extend to the cancellation, for whatever reason, of any lease, permit or any other instrument executed on behalf of the Crown.

RESOLVED that should the (name of person appointed) consider that a permit or lease is in default by reason of a breach of covenant, the (name of the person appointed) shall refer the matter, and all pertinent information in the First Nation's possession, to the Regional Director, Lands, Revenues and Trusts.

RESOLVED that all leases or permits for terms of more than five years will contain a periodic fee or rent review clause.

ALL OF THE FOREGOING BEING HEREBY RESOLVED this \_\_\_ day of \_\_\_\_\_, 20 \_\_\_.

\_\_\_\_\_  
Chief

\_\_\_\_\_  
Councillor

\_\_\_\_\_  
Councillor

\_\_\_\_\_  
Councillor

\_\_\_\_\_  
Councillor

\_\_\_\_\_  
Councillor

NOW THEREFORE WITNESS that a majority of the electors of the First Nation hereby assent to the presentation of this request for authority under Section 53 of the *Indian Act*, and tender in support thereof the results of the voting on this resolution which took place at a vote held \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_.

Number of Eligible electors \_\_\_\_\_

Number of Eligible electors who voted \_\_\_\_\_

Number of electors voting in favour \_\_\_\_\_

Number of electors voting against \_\_\_\_\_

Number of rejected ballots \_\_\_\_\_

\_\_\_\_\_  
Chief

\_\_\_\_\_  
Councillor

\_\_\_\_\_  
Electoral Officer



**REQUEST BY THE \_\_\_\_\_ BAND OF INDIANS**

**RE: SECTION 60 OF THE INDIAN ACT**

WHEREAS Section 60 of the *Indian Act* provides that:

- (1) the Governor in Council may at the request of a First Nation grant to the First Nation the right to exercise such control and management over lands in the reserve occupied by that First Nation as the Governor in Council considers desirable;
- (2) the Governor in Council may at any time withdraw from a First Nation a right conferred upon the First Nation under subsection (1);

RESOLVED that the Governor in Council grant to the (specify the First Nation of Indians) the right to exercise such control and management (as set out in the attached Schedule I) over the lands in the (specify the Reserve No.).

RESOLVED that the (First Nation's agent – usually the duly elected Chief and Council of the First Nation, from time to time) may exercise these rights on behalf of the First Nation and is authorized to execute and approve such leases, permits, assignments, consents and other instruments and documents as may be required in carrying out the authority delegated to the First Nation, subject, in each case, to the prior approval of a majority of the Chief and Councillors of the First Nation present at a meeting of the Council duly convened for the purpose.

RESOLVED that the (specify a person appointed by the Council of the First Nation usually the Land Manager) is authorized to execute documents duly approved by (the First Nation's agent).

RESOLVED that the approval by the (First Nation's agent) of any documents or instruments shall constitute an acknowledgment that the document or instrument is in the best interests of the First Nation.

RESOLVED that the Crown be indemnified from and against any and all causes of action arising from the improper exercise of the delegated authority by the First Nation or its authorized agent.

RESOLVED that no member of the (First Nation's agent) shall have a vote in the exercise of any authority provided for under this delegation, in which that member has a personal interest, either direct or indirect, except in those situations where it would be impossible to assemble a quorum.

RESOLVED that the exercise of the delegated authority will be in accordance with all relevant departmental policies and procedures in force from time to time and, without limiting the generality of the foregoing, the exercise of the delegated authority will be in accordance with any conflict of interest guidelines or policies issued by the department from time to time.

RESOLVED that the (First Nation's agent) shall maintain accounting records for leases and permits entered into, rentals received, receivable and overdue; shall operate a lease billing system; shall be responsible for collecting rentals under routine collection procedures; and shall submit quarterly a detailed aged listing of rentals receivable and collection action taken to the Regional Director, Lands, Revenues and Trust.

RESOLVED that the (First Nation's agent) shall establish and maintain a land management records system satisfactory to the Minister.

RESOLVED that an independent auditor shall be retained to conduct an annual financial audit of all financial matters relating to the exercise of the delegated authority in accordance with audit guidelines issued by the department from time to time, and that a copy of the financial audit be made available for inspection by members of the First Nation.

RESOLVED that the Minister may, at any time during the term of the delegated authority, conduct an on-site review of all documents, records and other systems such as will enable the said Minister to ascertain that the delegated authority is being exercised in accordance with the terms of this Request.

RESOLVED that the (First Nation's agent) shall make available to the First Nation and a designated officer of the Minister all records, financial statements, audits and other information as may be necessary to enable the Minister to monitor the exercise of the authorities delegated to the First Nation.

RESOLVED that the Financial Plan annexed hereto is an accurate reflection of the annual cash flow requirements on a monthly basis and that the agreed-upon level of funding will only be expended on matters directly related to the exercise of the authority.

RESOLVED that the form and terms of all leases, permits, transfers and other instruments executed under this authority will be pre-approved by the Department of Indian Affairs and Northern Development.

RESOLVED that the (First Nation's agent) shall forward duplicate originals of all documents executed pursuant to the delegated authority to Ottawa for registration in the Indian Lands Registry.

RESOLVED that the exercise of the delegated authority will be subject to the same pre-audit requirements that apply to the (specify the regional/district office) from time to time.

RESOLVED that action to recover overdue lease or permit monies may not be instituted without the prior approval of the Minister of Indian Affairs and Northern Development on the advice of the Department of Justice.

RESOLVED that the authority will not extend to the cancellation, for whatever reason, of any lease, permit of any other instrument executed on behalf of the Crown.

RESOLVED that should the (First Nation's agent) consider that a permit or lease is in default by reason of a breach of covenant, the (First Nation's agent) shall refer the matter, and all pertinent information in the First Nation's possession, to the Regional Director, Lands, Revenues and Trusts;

RESOLVED that all leases or permits for terms of more than five years will contain a period fee or rent review clause.

ALL OF THE FOREGOING BEING HEREBY RESOLVED this \_\_\_\_ day of \_\_\_\_, 20\_\_.

\_\_\_\_\_  
Chief

\_\_\_\_\_  
Councillor

\_\_\_\_\_  
Councillor

\_\_\_\_\_  
Councillor

\_\_\_\_\_  
Councillor

\_\_\_\_\_  
Councillor

## SCHEDULE I

(Note: A First Nation may seek delegation of authority for any or all of the following Sections.)

It is requested that the First Nation may exercise the power given to the Minister:

1. a) by subsection 18(2) of the *Indian Act* to authorize the use of lands in the reserve for the purpose of Indian schools, Indian burial grounds, Indian health projects, or any other purpose that is for the general welfare of the First Nation. This authority is subject to the proviso that where an Indian, immediately prior to such taking, was entitled to the possession of such lands, the Minister will retain the authority to fix the compensation payable to the Indian in the event that the First Nation and the individual disagree on the amount payable for such taking;
- b) by subsections 20(1) and 20(2) of the *Indian Act* to approve the allotment of land in a reserve to First Nation members and to approve the issuance of Certificates of Possession;
- c) by subsection 20(4) of the *Indian Act* to withhold approval for the allotment of land and to authorize temporary occupation under prescribed terms and conditions. This authority is subject to the proviso that when approval is so withheld, the First Nation must notify the individual Indian and the Minister, in writing, within 30 days of its decision, of the grounds for withholding approval, and of the individual's right of appeal to the Minister. Disputes will be settled by the Minister;
- d) by subsection 20(5) and 20(6) of the *Indian Act* to extend the term of Certificates of Occupation for a period not exceeding two years and at the expiry of this time to approve or reject the allotment. Refusal under subsection 20(6)(b) is subject to the same proviso with respect to written notification of the grounds for refusal and the right of appeal to the Minister as applies to refusals under subsection 20(4);
- e) by Section 24 of the *Indian Act* to approve transfers of land between First Nation members or between a member and his First Nation;
- f) by subsection 25(1) of the *Indian Act* to extend the time limit wherein an Indian who ceases to be entitled to reside on a reserve may dispose of his interest;
- g) by subsection 28(2) of the *Indian Act* to authorize by permit, in writing, any person to occupy or use the reserve or to reside or otherwise exercise rights on the reserve;

- h) by subsection 58(1)(b) of the *Indian Act* where land in the reserve is uncultivated or unused and is in the lawful possession of any individual, to grant a lease of such land for agricultural or grazing purposes or for any purpose that is for the benefit of the person in possession;
  - i) by subsection 58(1)(c) of the *Indian Act* where land in the reserve is uncultivated or unused and is not in the lawful possession of any individual, to grant for the benefit of the First Nation a lease of such land for agricultural or grazing purposes;
  - j) by subsection 58(3) of the *Indian Act* to lease for the benefit of any Indian, upon his application for that purpose, the land of which he is in lawful possession, without the land being designated;
  - k) by subsection 58(4) of the *Indian Act* to dispose of the property mentioned therein which is on the reserve and to issue the permits mentioned therein, subject to the Minister's power to determine the division of the proceeds where the First Nation and the individual Indian in lawful possession cannot agree;
2. It is understood and agreed that the exercise of the powers referred to in paragraphs 1(a) through 1(k) is subject to the following conditions:
- (i) The exercise of the delegated authority is subject to the same pre-audit requirements that apply to the (specify regional/district office) from time to time;
  - (ii) The form and terms of every lease, permit or other instrument shall be pre-approved by the Department of Indian Affairs and Northern Development;
  - (iii) All leases or permits for terms of more than 5 years shall contain a periodic fee or rent review clause;
  - (iv) No action to recover overdue lease monies or permit fees shall be taken without the prior approval of the Minister of Indian Affairs and Northern Development on the advice of the Department of Justice;
  - (v) The authority does not extend to the cancellation, for whatever reason, of any lease, permit or any other instrument executed on behalf of the Crown;
  - (vi) The exercise of the authority must be in accordance with all relevant departmental policies and procedures, including all policies concerning conflicts of interest.

NOW THEREFORE WITNESS that a majority or the electors of the First Nation hereby assent to the submission of this Request for authority under Section 60 of the *Indian Act*.

Number of Eligible electors \_\_\_\_\_

Number of Eligible electors who voted \_\_\_\_\_

Number of electors voting in favour \_\_\_\_\_

Number of electors voting against \_\_\_\_\_

Number of rejected ballot \_\_\_\_\_

\_\_\_\_\_  
Chief

\_\_\_\_\_  
Councillor

\_\_\_\_\_  
Electoral Officer

## DIRECTIVE 11-03 CONSENT TO A DELEGATION

### 1.0 Purpose

- 1.1 This directive explains the requirements for the consent of eligible electors to delegations under Sections 53 and/or 60 of the *Indian Act*. It also explains various processes enabling First Nations to obtain consent. You should read this bulletin for information on:
- a) the principles that underlie the processes for obtaining consent of eligible electors for delegations under Sections 53 and/or 60 of the *Indian Act*.
  - b) different consent processes available to First Nations, including the steps for obtaining departmental approval for those processes.

### 2.0 General

- 2.1 Delegations of land management authority are authorized under Sections 53 and/or 60 of the *Indian Act*.
- a) Some delegations are sought by First Nations under Section 53 for designated or surrendered land.
  - b) Other delegations are sought under Section 60 by First Nations for Reserve land.
  - c) Most First Nations seek delegations under both Section 53 and 60 to gain complete land management authority.

### 3.0 Authorities

- 3.1 Statutory authorities governing First Nations consent are Sections 2,(3)(a), 53, and 60 of the *Indian Act*.

- 2. (3) *Unless the context otherwise requires or this Act otherwise provides,*
  - (a) *a power conferred on a band shall be deemed not to be exercised unless it is exercised pursuant to the consent of a majority of the electors of the band;*
- 53. (1) *The Minister or a person appointed by the Minister for the purpose may, in accordance with this Act and the terms of the absolute surrender or designation, as the case may be,*

- (a) *manage or sell absolutely surrendered lands; or*
- (b) *manage, lease or carry out any other transaction affecting designated lands.*
60. (1) *The Governor in Council may at the request of a band grant to the band the right to exercise such control and management over lands in the reserve occupied by that band as the Governor in Council considers desirable.*
- (2) *The Governor in Council may at anytime withdraw from a band a right conferred on the band under subsection (1).*

### 3.0 Policy

- 4.1 First Nations seeking delegations under Sections 53 and 60 of the *Indian Act* must obtain informed consent from eligible electors. Requirements for delegations under Section 60 are more stringent than those for delegations under Section 53.
- 4.2 There is no statutory requirement for consent under Section 53. However, departmental policy requires that a majority of the electors must participate in a vote and a majority of those participating must vote in favour of the delegation for s. 53 delegations. In other words, 51% or more of the total electors of the band must vote, and of those, at least 51% must vote in favour of the delegation for the necessary consent to have been obtained.

**EXAMPLE 1: DELEGATION UNDER SECTION 53:  
MAJORITY OF MAJORITY OF ELECTORS**

There are 100 electors. 51 electors (majority) participate in the vote. If 26 (majority) of those electors participating vote in favour of the delegation of authority, consent has been obtained.

- 4.3 To obtain informed consent for delegated authority for reserve land management under section 60 of the *Indian Act*, a majority of the electors must participate in a vote and a majority of those participating must vote in favour of the delegation. Therefore, a delegation under section 60 requires that 51% or more of the total electors of the band must vote, and those electors, at least 51% must vote in favour of the delegation for the necessary consent to be obtained.

**EXAMPLE 2: DELEGATION UNDER SECTION 60:  
MAJORITY OF MAJORITY OF ELECTORS**

There are 100 band electors. 51 electors (majority) participate in the vote. If 26 (majority) of those electors participating vote in favour of the delegation authority, consent has been obtained.



- 4.4 When delegations are sought under both sections, the requirements of Section 60 apply.
- 4.5 There are four proposed means for obtaining informed consent:
- a) Meetings (See Annex A to this directive for detailed process steps)
  - b) Referenda (See Annex B)
  - c) Petitions (See Annex C)
  - d) Consent Forms (see Annex D)
- 4.6 First Nations may use **any** consent process they wish, including a combination of the above, as long as it meets departmental criteria. The approval process for alternate means of obtaining consent is described in the checklist in Annex E to this directive. An alternative process will only be accepted as meeting the requirements of the *Indian Act* if it has previously been approved by the Director of Lands. Also, processes that combine the above means must not allow voters to participate more than once in the consent process.
- 4.7 The Director of Lands approves alternate consent processes based on three criteria. The process must:
- a) Ensure that eligible electors understood the question and had access to all available information;
  - b) Ensure that all electors were given an opportunity to participate and that only eligible electors, in fact, participated; and,
  - c) Allow the department to verify the outcome of the vote.
- 4.8 In cases where the procedure or outcome relating to a process for obtaining consent is challenged, the appeal process described in Sections 22 and 23 of the *Indian Referendum Regulations* shall apply.
- 5.0 Process**
- 5.1 This section provides an overview of the four processes available for obtaining consent for those First Nations who have been deemed eligible by the department.
- a) The First Nation decides if it wants a delegation under Section 53 or 60 or under both, and chooses the most appropriate consent process

- b) The First Nation chooses the prepared standard question, or creates its own according to approved criteria.
- c) The department and First Nation provide the community with all available information to ensure informed consent.
- d) The First Nation prepares for selected consent process. This includes all activities such as posting documents, appointing a coordinator and holding meetings.
- e) The First Nation conducts the consent process
- f) The department verifies the consent process and the results to ensure that informed consent was obtained. This verification includes the verification of documents, procedures, and conduct.

5.2 The major steps for obtaining consent by alternate means are outlined below:

- a) The First Nation develops and drafts an outline of the chosen consent process.
- b) The Regional Office reviews and analyses the submission
- c) Headquarters reviews the submission and analysis; the Director of Lands approves or rejects the submission
- d) Headquarters prepares a decision bulletin and sends the answer to the region and the First Nation.

## 6.0 References

6.1 In addition to the *Indian Act*, you may want to consult:

- a) The *Indian Referendum Regulations*

## ANNEX A MEETING CHECKLIST

The following steps must be taken by the organization or individual indicated to obtain First Nation consent to delegation through a meeting process:

1	<b>First Nation:</b> Determines what delegated authorities are requested (s. 53, 60 or both).	
2	Selects meeting process to obtain consent.	
3	Selects pre-determined question that will be put to voters at meeting according to authority requested or,	
4	Drafts its own question and submits it for authorization.	
5	Notifies INAC Field of selected consent process.	
6	Passes First Nation Council Resolution (BCR) requesting delegation, and detailing: a) Date of meeting and vote b) Method of voting c) Request to the Minister to appoint Electoral Officer for meeting	
7	Sends signed copy of BCR to INAC field along with copy of official notice.	
8	<b>INAC Field:</b> Checks package to ensure completeness and that documents meet form and content requirements.	
9	If corrections are required, advises First Nation.	
10	Sends complete package to INAC Headquarters.	
11	<b>INAC Headquarters:</b> Checks package to ensure completeness and raises any questions with INAC Field.	
12	Advises INAC Field when package considered complete and correct.	
13	<b>INAC Field:</b> Informs First Nation by phone or by fax that meeting can proceed.	
14	Ministerial delegate appoints Electoral Officer.	
15	Electoral Officer can appoint a Deputy Electoral Officer (usually a First Nation member) who has the same authority and responsibilities as the Electoral Officer.	
16	Provides First Nation with information needed to allow electors to provide informed consent. This should include: a) A description of designated land b) Land Management Transactions c) Land Management Revenues d) Powers and Authorities to be delegated	

17	<b>First Nation:</b> Assembles all information available to supplement the information listed in paragraph 16 above.	
18	<b>INAC Field (Electoral Officer) or First Nation (Deputy Electoral Officer):</b> Proceeds with meeting by posting notice. Notice should include: <ul style="list-style-type: none"> <li>a) A reference to the delegation documents</li> <li>b) The question being put forward to the electors</li> <li>c) The time when meeting will be held</li> <li>d) The location of the meeting</li> <li>e) Notice of when the list of electors will be posted and how to have it revised if incorrect, e.g. where someone has been omitted</li> <li>f) The date and location of posted notice</li> <li>g) The Electoral Officer's signature</li> </ul>	
19	Posting – 30 days notice must be given — notice must be posted in public places — Electoral Officer arranges for following documents to be attached to the notices: <ul style="list-style-type: none"> <li>a) A copy of the BCR</li> <li>b) A copy of the delegation documents</li> <li>c) A sample of the question</li> </ul>	
20	Electoral Officer is responsible for: <ul style="list-style-type: none"> <li>a) Preparing list of eligible electors</li> <li>b) Arranging for meeting facilities such as place, interpreters, transcripts and minutes of meeting</li> <li>c) Preparing documentation for meetings</li> <li>d) Arranging for minutes of meeting to be sworn</li> <li>e) Organizing available information for notices</li> <li>f) Arranging affidavits for those who are eligible to vote but do not appear on the list</li> <li>g) Training and directing those who will be assisting in conducting the meeting</li> <li>h) Conducting meeting</li> </ul>	
21	Conducting meeting includes: <ul style="list-style-type: none"> <li>a) Opening meeting hall</li> <li>b) Chairing meeting</li> <li>c) Counting votes for and against</li> </ul>	
22	Electoral Officer keeps results of meeting vote for seven day appeal period.	
23	Sends assembled package to INAC Headquarters including: <ul style="list-style-type: none"> <li>a) BCR agreeing to meeting process</li> <li>b) Notice of meeting with attachments, initialled by Chief and Council</li> <li>c) List of electors</li> <li>d) Minutes of meeting</li> <li>e) Testimony of interpreters, minute takers and volunteers</li> <li>f) Vote results</li> <li>g) Any other relevant information</li> </ul>	

24	<b>INAC Headquarters:</b> Checks that package is complete.	
25	Ensures list of eligible voters contained in package matches INAC list of First Nation members.	
26	Verifies consent requirement along with other entry criteria.	

**ANNEX B  
REFERENDUM CHECKLIST**

The following steps must be taken by the organization or individual indicated to obtain First Nation consent to delegation through a referendum process:

1	<b>First Nation:</b> Determines what delegated authorities are requested (s. 53, 60 or both).	
2	Selects referendum process to obtain consent.	
3	Selects pre-determined question that will appear on referendum ballot according to authority requested; or,  Drafts its own question and submits it for authorization.	
4	Notifies INAC Field of selected consent process.	
5	Passes First Nation Council Resolution (BCR) requesting delegation, and detailing:  a) Request to the Minister to call the referendum and date of vote b) Method of voting c) Request to the Minister to appoint Electoral Officer for referendum	
6	Sends signed copy of BCR to INAC field along with copy of:  a) Official notice b) Ballot	
7	<b>INAC Field:</b> Checks package to ensure completeness and that documents meet form and content requirements.	
8	If corrections are required, advises First Nation.	
9	Sends complete package to INAC Headquarters.	
10	<b>INAC Headquarters:</b> Checks package to ensure completeness and raises any questions with INAC Field.	
11	Advises INAC Field when package considered complete and correct.	
12	<b>INAC Field:</b> Informs First Nation by phone or by fax that the referendum can proceed.	
13	Ministerial delegate appoints Electoral Officer.	
14	Electoral Officer can appoint a Deputy Electoral Officer (usually a First Nation member) who has the same authority and responsibilities as the Electoral Officer.	

<p>15</p>	<p>Provides First Nation with information on informed consent. This should include:</p> <ul style="list-style-type: none"> <li>a) A description of designated land</li> <li>b) Land Management Transactions</li> <li>c) Land Management Revenues</li> <li>d) Powers and Authorities to be delegated</li> </ul>	
<p>16</p>	<p><b>First Nation:</b> Assembles all information available to supplement the information Paragraph 15 above</p>	
<p>17</p>	<p><b>INAC Field (Electoral Officer) or First Nation (Deputy Electoral Officer):</b> Proceeds with referendum by posting notice. Notice should include:</p> <ul style="list-style-type: none"> <li>a) A reference to the delegation documents</li> <li>b) The question being put forward to the electors</li> <li>c) The hours when the polls will be open</li> <li>d) The location of the polling booth(s)</li> <li>e) Notice of when the list of electors will be posted and how to have it revised if incorrect (e.g., where someone has been omitted)</li> <li>f) The date and location of posted notice</li> <li>g) The Electoral Officer's signature</li> </ul>	
<p>18</p>	<p>Posting – 42 days notice must be given — notice must be posted in public places — Electoral Officer arranges for following documents to be attached to the notices:</p> <ul style="list-style-type: none"> <li>a) A copy of the BCR</li> <li>b) A list of the eligible electors</li> <li>c) A copy of the delegation documents</li> <li>d) A sample of the ballot</li> </ul>	
<p>19</p>	<p>Electoral Officer is responsible for:</p> <ul style="list-style-type: none"> <li>a) Preparing list of eligible electors</li> <li>b) Arranging for meeting facilities such as place, interpreters, transcripts and minutes of meeting</li> <li>c) Preparing documentation for meetings</li> <li>d) To mail or deliver to every elector of the band who does not reside on the reserve and for whom an address has been provided <ul style="list-style-type: none"> <li>- a notice of the referendum,</li> <li>- a mail-in ballot, initialed on the back by the electoral officer,</li> <li>- an outer, postage-paid return envelope, pre-addressed to the electoral officer,</li> <li>- a second, inner envelope marked "Ballot" for insertion of the completed ballot,</li> <li>- a voter declaration form,</li> <li>- a letter of instruction regarding voting by mail-in ballot, and</li> <li>- an information package regarding the delegation of s. 60 which is the subject of the referendum.</li> </ul> </li> <li>e) Arranging for minutes of meeting to be sworn</li> <li>f) Arranging for printing of referendum ballots</li> <li>g) Organizing available information for notices</li> <li>h) Arranging affidavits for those who are eligible to vote but do not appear on the list</li> <li>i) Setting up voting booth and ballot box</li> </ul>	

	<ul style="list-style-type: none"> <li>j) Training and directing those who will be assisting in conducting the referendum</li> <li>k) Conducting referendum</li> </ul>	
20	<p>Conducting referendum includes:</p> <ul style="list-style-type: none"> <li>a) Opening polls (must stay open from 9:00 am local time, until 8:00 pm, local time</li> <li>b) Asking witness to inspect inside of ballot box before it is sealed and locked</li> <li>c) Initialling ballots before giving them to voters</li> <li>d) Counting ballots when polls close</li> </ul>	
21	Electoral Officer keeps results of referendum for 60 day appeal period.	
22	<p>Sends assembled package to INAC Headquarters including:</p> <ul style="list-style-type: none"> <li>a) BCR requesting Minister to call referendum</li> <li>b) Notice of referendum with attachments, initialled by Chief and Council</li> <li>c) List of electors</li> <li>d) Signed referendum ballots</li> <li>e) Minutes of information meeting(s)</li> <li>f) Testimony of interpreters, minute takers and volunteers</li> <li>g) Referendum results</li> <li>h) Any other relevant information</li> </ul>	
23	<p><b>INAC Headquarters:</b> Checks that package is complete.</p>	
24	Ensures list of eligible voters contained in package matches INAC list of First Nation members.	
25	Verifies consent requirement along with other entry criteria.	



### ANNEX C PETITION CHECKLIST

The following steps must be taken by the organization or individual indicated to obtain First Nation consent to delegation through a petition process:

1	<p><b>First Nation:</b> Determines what delegated authorities are requested (s. 53, 60 or both).</p>	
2	Selects petition process to obtain consent.	
3	Selects pre-determined question that will appear on petition according to authority requested or,	
4	Drafts its own question and submits it for authorization using process in Annex E to this directive.	
5	Notifies INAC Field of selected consent process.	
6	Sets up schedule for petition process including start date and milestones.	
7	<p><b>INAC Field:</b> Provides First Nation with information on informed consent. This should include:</p> <ul style="list-style-type: none"> <li>a) A description of designated land</li> <li>b) Land Management Transactions</li> <li>c) Land Management Revenues</li> <li>d) Powers and Authorities to be delegated</li> <li>e) A copy of the bulletin on consent</li> </ul>	
8	<p>Advises First Nation on options for providing information to First Nation members such as:</p> <ul style="list-style-type: none"> <li>a) Documents posted or available for viewing (Petition, Order in Council, Letter of Appointment)</li> <li>b) Information meeting(s)</li> <li>c) Pamphlets or publications</li> <li>d) Media spots and announcements best suited to the situation (newspapers, radio)</li> </ul>	
9	<p><b>First Nation:</b> Reviews information package and reviews any questions with INAC Field.</p>	
10	<p>Appoints a coordinator responsible for:</p> <ul style="list-style-type: none"> <li>a) Preparing documentation</li> <li>b) Selecting and training volunteers who will assist with the petition</li> <li>c) Preparing list of eligible electors</li> <li>d) Arranging for printing of petitions</li> <li>e) Organizing available information</li> <li>f) Drafting public and householder notices</li> <li>g) Posting information in public places, household mailings, notices in electronic media</li> </ul>	

	<ul style="list-style-type: none"> <li>h) Arranging for information meeting (on 15 days public notice) including facilities such as place, interpreters, transcripts and minutes of meeting <b>(Note: Interpreters must be sworn in and minutes of meeting must be sworn to.)</b></li> <li>i) Subject to approval of Council, presence of departmental officer</li> <li>j) Conducting petition</li> <li>k) Compiling results of petition</li> <li>l) Taking sworn statements of each volunteer saying that they have complied with procedure set out in (d) below</li> <li>m) Upon completion of process, sending all of the following to INAC Field:               <ul style="list-style-type: none"> <li>- Signed Petition</li> <li>- Copies of all information material and notices</li> <li>- Sworn minutes of information meeting(s)</li> <li>- Testimony of interpreters, minute takers and volunteers</li> <li>- Petition results</li> </ul> </li> </ul>	
11	<p>Conducting petition includes:</p> <ul style="list-style-type: none"> <li>a) Household to household visits for signing</li> <li>b) Signing at the First Nation Council office</li> <li>c) Signing at the Regional and District offices for off-reserve electors</li> </ul>	
12	<p>Volunteers must do the following for every signature:</p> <ul style="list-style-type: none"> <li>a) Explain the nature of petition including reading out the question</li> <li>b) Verify identity of individual being canvassed and whether he/she is eligible elector</li> <li>c) Verify that each individual had access to available information</li> <li>d) Provide opportunity to view information</li> <li>e) Obtain signature</li> <li>f) Witness signature</li> <li>g) Identify signature and status of elector</li> </ul>	
13	<p><b>INAC Field:</b> Checks that package is complete.</p>	
14	Ensures list of eligible voters contained in package matches INAC list of First Nation members.	
15	Sends package to headquarters once all other documents on delegation have been received.	
16	<p><b>INAC Headquarters:</b> Checks that package is complete.</p>	
17	Ensures list of eligible voters contained in package matches INAC list of First Nation members.	
18	Verifies consent requirement along with other entry criteria.	

## ANNEX D CONSENT FROM CHECKLIST

The following steps must be taken by the organization or individual indicated to obtain First Nation consent to delegation through a consent form process:

1	<b>First Nation:</b> Determines what delegated authorities are requested (s. 53, 60 or both).	
2	Selects consent form process to obtain consent.	
3	Selects pre-determined question that will appear on consent form according to authority requested or,	
4	Drafts its own question and submits it for authorization using process in Annex E to this directive.	
5	Notifies INAC Field of selected consent process.	
6	Sets up schedule for consent form process including date(s) of information meeting(s) and date(s) on which the consent form will be available to be signed.	
7	<b>INAC Field:</b> Provides First Nation with information on informed consent. This should include:  a) A description of designated land b) Land Management Transactions c) Land Management Revenues d) Powers and Authorities to be delegated e) A copy of the bulletin on consent	
8	Advises First Nation on options for providing information to First Nation members such as:  a) Documents posted or available for viewing b) Pamphlets or publications c) Information meeting(s) d) Media spots and announcements best suited to the situation (Newspapers, Radio)	
9	<b>First Nation:</b> Reviews information package and reviews any questions with INAC Field.	
10	Appoints a coordinator responsible for:  a) Preparing documentation b) Selecting and training volunteers who will assist with the consent form c) Preparing list of eligible electors d) Organizing available information e) Drafting public and householder notices f) Posting information in public places, household mailings, notices in electronic media	

	<p>g) Arranging for information meeting (on 15 days public notice) including facilities such as place, interpreters, transcripts and minutes of meeting <b>(Note: Interpreters must be sworn in and minutes of meeting must be sworn to.)</b></p> <p>h) Subject to approval of Council, presence of departmental officer</p> <p>i) Conducting process</p> <p>j) Compiling results of consent form process</p> <p>k) Taking sworn statements of each volunteer saying that they have complied with procedure set out in (d) below</p> <p>l) Upon completion of process, sending all of the following to INAC Field:</p> <ul style="list-style-type: none"> <li>- Signed consent forms</li> <li>- Copies of all information material and notices</li> <li>- Sworn minutes of information meeting(s)</li> <li>- Testimony of interpreters, minute takers and volunteers</li> <li>- Results</li> </ul>	
11	<p>Conducting process includes:</p> <p>a) Household to household visits for signing</p> <p>b) Signing at the First Nation Council office</p> <p>c) Signing at the Regional and District offices for off-reserve electors</p>	
12	<p>Volunteers must do the following for every signature:</p> <p>a) Explain the nature of consent form including reading out the question</p> <p>b) Verify identity of individual being canvassed and whether he/she is eligible elector</p> <p>c) Verify that each individual had access to available information</p> <p>d) Provide opportunity to view information</p> <p>e) Obtain signature</p> <p>f) Witness signature</p> <p>g) Identify signature and status of elector</p>	
13	<p><b>INAC Field:</b> Checks that package is complete.</p>	
14	<p>Ensures list of eligible voters contained in package matches INAC list of First Nation members.</p>	
15	<p>Sends package to headquarters once all other documents on delegation have been received.</p>	
16	<p><b>INAC Headquarters:</b> Checks that package is complete.</p>	
17	<p>Ensures list of eligible voters contained in package matches INAC list of First Nation members.</p>	
18	<p>Verifies consent requirement along with other entry criteria.</p>	

## DIRECTIVE 11- 4 ADMINISTRATION AND FUNDING

### 1.0 Purpose

- 1.1 The purpose of this directive is to explain the management framework for administering the department's land management programs. It is primarily concerned with administrative requirements and procedures.

### 2.0 General

- 2.1 The Director of Lands and the Regional Directors of Lands and Trust Services are responsible for departmental land management budgets. Therefore, they are responsible for the following funding management activities:
- a) **First Nation estimates for funds required in the future.** Managers must include three to five year forecasts in business plans and annual forecasts in the estimates. Forecasts are educated guesses based on certain assumptions and the best data available at the time.
  - b) **Preparing budgets for each land management program for each First Nation and summarizing these in district, regional and national budgets.** Budgets must be accurate since they reflect commitments to fund First Nations at given levels.
  - c) **Determining the amount to which each First Nation is entitled for the programs being funded and the amounts which will be paid out under the budget.** They must also ensure that the national, regional, district budgets reflect the proper allocation of the budget among First Nations.
  - d) Determining the services which will be rendered, reports to be made and other terms and conditions of funding for land management funds.
  - e) **Ensuring that funds are transferred to the right First Nations under the right types of agreements, at the right times and in the right amounts.**
  - f) **Certifying that each payment made is being made in accordance with the terms of the funding arrangement and that the services were delivered in accordance with the arrangement at the end of each year.** The last directive in this chapter deals with these requirements in more detail.

- 2.2 The department funds First Nations through contractual type agreements called funding arrangements. Different types of agreements reflect different degrees of autonomy and flexibility. Land management funds may be paid out under any one of four types of funding arrangements:
- a) **Comprehensive Funding Arrangements (CFAs)** are the most common type of arrangements. They allow First Nations to re-allocate any funds which may be left at year end if they have delivered all required services at the required standards.
  - b) **Alternative Funding Arrangements (AFAs)** are widely used. They are multi-year agreements which allow First Nations to re-allocate budgets as long as service goals and standards are met. They have fewer controls and a minimum of financial reporting.
  - c) **Fiscal Transfer Agreements** are agreements that base funding on base budgets and universal adjustment formulas rather than the transaction based formulas used for many programs. They are multi-year agreements with reduced controls and less reporting.
  - d) **Self-government Arrangements** are very rare. They transfer funds for all programs in the form of accountable grants similar to those used in federal-provincial transfer payments. They are based on certain principles but vary widely because each one is separately negotiated.
- 2.3 The majority of departmental programs are delivered through transfer payments to First Nations under different types of funding arrangements. Consequently, the department has established a corporate management regime which governs all programs including land management programs. The primary responsibility for this regime rests with the following organizations.
- a) **Headquarters Finance Branch:** The Transfer Payments Directorate is responsible for funding arrangements, terms, conditions, policies and remedial action. Other directorates are responsible for forecasting, budgeting and financial authorities.
  - b) **Regional Funding Services Directorates:** These directorates may have other names. They have responsibilities which are parallel to those of the Transfer Payment Directorate in headquarters. This includes funding arrangements and remedial action.
  - c) **Regional Corporate Services Directorates:** These directorates are responsible for forecasting, budgeting, transfers and payment.

- 2.4 **Funding is determined using a formula.** The amount of land management funding provided to a First Nation is based on a formula approved by Treasury Board. A detailed description and explanation of the formula is given in Appendix A to this chapter. Key features of the formula are:
- a) **The formula is transaction-based**, in that it provides funds on the basis of the number of leases, permits and allotments processed and administered by a First Nation. Other types of interests and transactions are either linked to leases and permits or included in a 14% allowance.
  - b) **The formula is retrospective** in that it funds First Nations for the upcoming fiscal year based on the transaction administered the previous year. As shown in Example 1, funding for the fiscal year running from April 1st, Year 2 to March 31st, Year 3 would be based on data as of December 31st, Year 1.
  - c) **The formula is labour intensive** and it involves collecting five pieces of data from various sources for every active lease, permit and allotment and performing up to sixty four calculations.

**EXAMPLE 1: CUT OFF DATES FOR DATA**

**Situation:** It is January, Year 2. You are calculating funding for the fiscal year starting April 1, Year 2 and ending March 31, Year 3.

**Question:** What is the cut off date for transactions to be included in your calculations?

**Answer:** All registered transactions which are in effect as of December 31st, Year 1 can be counted in your calculations. Also, any transaction which was both registered and expired during Year 1 can be counted.

- 2.5 Each transaction is assigned a person day value under the formula. As shown in the diagram in Chart 1, the use of the formula involves:
- a) **Preparation:** The work instruments and data needed to use the formula must be gathered. It is often the most time consuming part of the process.
  - b) **Calculating Person Years:** The Person days required to do the transactions must be totalled and adjusted, and then converted to person years by dividing by 208.
  - c) **Costing Person Years:** Each person year is costed at one of the three rates specified in the formula.

- d) **Calculating Funding for the Delegation Program:** funding is calculated as 127% of the base amount arrived at by costing person years. **For the administration program,** funding is 80% of this base.
- e) **Finalizing Funding:** Where necessary, funding is adjusted for late entry, previous under-funding or previous over-funding.

### 3.0 Authorities

- 3.1 Funding management functions are broadly governed by the *Financial Administration Act* (FAA) and the relevant appropriation Acts.
- 3.2 The Treasury Board Secretariat issues policy circulars, manuals and other guidelines governing such matters as cash flow, terms and conditions and audit of transfer payments. These are available from the headquarters and regional Corporate Services staff.
- 3.3 **Treasury Board Authorities:** The eligibility criteria, funding formula, terms, conditions and methods of payment for land management funding are governed by separate Treasury Board authorities covering:
  - a) **The 53/60 program** was initially authorized in 1983 and last revised in 1994. Authority is renewed annually through the business plan.
  - b) **The RLAP Program** was authorized in 1994. Authority is renewed annually through the business plan.
  - c) **Alternative Funding Arrangements** were authorized in 1987 and are amended as required through annual business plans.
  - d) **Comprehensive Funding Arrangements** were authorized in 1989 and are amended as required through annual business plans.
  - e) **Fiscal Transfer Agreements** were first authorized in 1995 and are amended as required through annual business plans.
- 3.4 **Departmental Authorities:** The department has established a number of policies and guidelines governing transfer payment management in general and land management funding in particular. These include:
  - a) **National Model Comprehensive Funding Arrangement** is a mandatory guideline issued by the Finance Branch and updated annually. It states the minimum terms and conditions applicable to all programs. It also states specific terms and conditions for each individual funding program. The land management terms and conditions specify service delivery and reporting requirements for both the administration and delegation programs.



- b) **National Model Alternative Funding Arrangement** is a guideline which is also issued by the Finance Branch and is similar to the Model Comprehensive Funding Arrangement.
- c) **Land Management Manual**, particularly this chapter, governs those policies, requirements, systems and procedures specific to managing funding for land management programs.
- d) **Financial Management Manual (DRM 10-2)** lays out the general policies, requirements, systems and procedures governing financial management in general and transfer payment management in particular.

#### 4.0 Policy

- 4.1 First Nations participating in these programs are performing critical functions with respect to management of their reserve lands. The department is committed to ensuring First Nations get the proper administrative and financial support. More specifically this means:
  - a) The amount received by the First Nation matches its entitlement under the formula and the notice received from the department. There should be no errors and no surprises.
  - b) The first cheque should arrive on April 1st. The rest should arrive when they are due.
  - c) First Nations should receive the amounts at the correct office or deposited in the correct account. The programs, budgets and arrangements to which the amounts sent are charged should all be correct.
- 4.2 The second objective is to achieve and implement a clear mutual understanding of roles and responsibilities. It is important that the funding arrangement reflect the understanding of roles and responsibilities described in Directive 11-02. In addition, the arrangement must be implemented in a manner which ensures that these roles and responsibilities are effectively carried out. This will include the monitoring activities described in Directive 11-05.
- 4.3 First Nations will receive funding according to approved formulas to the extent that budgets permit. The department is committed to the fair, rational and objective allocation of land management funds. It is also constrained by the resources which are made available by Parliament. This is reflected in the following principles:
  - a) **DIAND will fund in accordance with the formula.** The department will adhere to the formula wherever possible and is committed to using the formula for all funding decisions and applying it in a fair and reasonable way.

- b) **DIAND will minimize the impacts of funding shortfalls.** Land management is a critically important function which costs relatively little. Consequently, DIAND will make every effort to fund all requirements identified and to give priority to land management funding. Where there is a shortage of funds DIAND will combine efficiency improvements, reduced funding and reductions in participation. The department's objective will be to minimize the negative impacts of shortfalls.
- c) **DIAND will ensure complete disclosure,** and that the information provided is as complete and comprehensive as possible under the circumstances.

4.4 **Funding arrangements must fit the programs.** The government is pursuing several important goals in building effective relationships with First Nations. These involve shifting accountability, authority and resources from the government to First Nations and their institutions. However, the government's statutory duties and fiduciary obligations must come first. Consequently, where there is a conflict between the requirements of a particular funding arrangement and a land management program, land management should be excluded from the arrangement or be recognized as an exception.

## 5.0 Process

5.1 The management of land management funds and funding arrangements involves four distinct processes as well as the entry process described in Directive 11-02 and the monitoring and remedial action processes described in Directive 11-05. These can be summarized as follows:

- a) **Forecasting:** The purpose of this process is to estimate participation rates and funding requirements for each land management program in future years. It supports the department's business plan, planning and sector, branch and directorate strategies and plans.
- b) **Budgeting and Allocation:** The purpose of this process is to determine the funds which will be required for land management programs for each First Nation, district and region in a given fiscal year.
- c) **Arrangement Drafting:** The purpose of this process is to ensure that the terms and conditions of the funding arrangement clearly reflect the objective, amount, terms and conditions of funding.
- d) **Payment:** The purpose of this process is to ensure that eligible First Nations receive timely and accurate payments so long as they deliver the services funded in accordance with the arrangement.

- 5.2 The forecasting process is based on the funding formula and the type of arrangement in place. It generally involves the following major steps:
- a) **Call Package:** The Lands Directorate at Headquarters will determine the form, content and other requirements for the forecast in consultation with headquarters finance and other stakeholders. They then issue a call for regional forecasts reflecting these requirements, with copies to First Nations and districts.
  - b) **Regional Input:** Regions update projected entry of new participants and related costs in consultation with First Nations and on the basis of their assessment of the best information available. This will include requesting volume forecasts for First Nations already in these programs. It will also include applying any automatic increases which may be included in self-government or fiscal transfer agreements.
  - c) **First Nation Input:** First Nations must submit an updated calculation of their funding entitlement and an updated list of transactions currently under development. These are part of the package sent to headquarters by regions in response to the call for forecasts.
  - d) **Headquarters Review:** Headquarters Lands Officers will review regional submissions for consistency, reasonableness and accuracy and resolve any issues or questions. They will then compile a national forecast which will include headquarters activities and other programs such as training.
  - e) **Headquarters Approval:** Headquarters Lands Officers will obtain management approval for the forecast and submit and explain to Headquarters Finance Officers, or in the case of internal strategies the requesting manager.
- 5.3 The budgeting process is also based on the funding formula and regional arrangements. The budgeting process is very similar to the forecasting process except that it is based on approved funding applications from participants and new entrants. As is the case with forecasting the process involves the following stages:
- a) **Call Package:** Headquarters issues a request to First Nations asking them to submit funding applications to regions by early January. The request will include advice regarding any changes in the formula, methods of calculations or funding arrangements applicable to the upcoming year.
  - b) **First Nation Applications:** First Nations complete funding applications in accordance with the call and the most recent version of *An Executive's Guide to the Land Management Funding Formula*. They then submit them to regions by the required date.

- c) **Regional Review:** Regions verify that all applicants are eligible for funding. They also review the applications and supporting data and resolve any questions or issues which may arise. This will include advice on the application of escalator clauses to First Nations with self-government, global funding or fiscal transfer agreements. Finally, they submit the applications, their budget request and their recommendations to headquarters.
  - d) **Headquarters Lands Review:** Headquarters Lands Officers will review regional submissions and a sample of First Nation applications. The purpose of this review will be to ensure accuracy, consistency and conformity with the formula and departmental policy.
  - e) **Headquarters Finance Review:** Headquarters Finance Officers will review the Lands submission and resolve any question or issues which may arise. This will include reconciling land management budgets for First Nations under alternative funding arrangements with the amounts shown in funding applications.
  - f) **Budget Transfers:** Headquarters Finance Officers transfer regional budgets to regions. Headquarters lands will advise of the amounts being transferred and explain any adjustments which have been made to regional budgets or individual funding applications.
  - g) **Budget Reconciliations:** Regions and First Nations review their budget allocations and reconcile them to the funding applications and submissions which they had made. This reconciliation includes identifying and addressing all issues and questions.
- 5.4 **Arrangement Drafting:** The Arrangement drafting process is tied to overall funding management processes. Its primary purpose is to review, update, communicate and explain the terms and conditions of funding to all those involved in implementing funding arrangements. This involves the following major phases:
- a) **Headquarters Lands Review:** Headquarters reviews the terms and conditions of each land management program for each type of funding arrangement. Its purpose is to ensure that these reflect the current legal, policy, operational and fiscal framework for these programs. Reviews are conducted in consultation with regions, First Nations and the Transfer Payments Directorate in headquarters. Terms and conditions focus on service delivery and reporting requirements and standards for these programs.

- b) **Headquarters Finance Review:** The Transfer Payments Directorate identifies and resolves any questions or issues regarding the proposed revisions, revises the model agreements and advises lands of the new terms and conditions.
  - c) Both headquarters Lands and Transfer Payments advise their regional counterparts regarding the approved changes. Regions are responsible to ensure that these changes are explained to First Nations.
- 5.5 The payment process is governed by regional financial management systems. This process is designed to ensure that payments are only made to First Nations which remain eligible for the program and to deliver the required services and reports where funds are available in the budget. Payment must be integrated with the funding management and financial management processes in place in each region. It involves the following major stages:
- a) **Arrangement Review:** Regional lands staff reviews the funding arrangement against the funding applications and model arrangement to verify eligibility, budget amounts and terms and conditions are correct. The arrangement review includes resolving any issues or questions with regional finance and funding service staff.
  - b) **Payment Review:** Regions certify the initial payment and subsequent payments are made in accordance with the terms of the funding arrangement. The certification involves verifying continued eligibility and compliance using the monitoring procedures described in Directive 11-05.
  - c) **Cheque Issue:** Regional finance staff issue the payments.
- 6.0 Implementation**
- 6.1 This policy confirms existing authorities and practice and is effective as of the date of publication.
  - 6.2 Most of the requirements and processes described in this directive are tied to government and department wide systems. Consequently, the work instruments and procedures used will be updated annually to reflect changes in these broader systems.
  - 6.3 Headquarters Lands staff will support headquarters and regional budget managers by:

- a) Obtaining input from finance, regions, First Nations and other stakeholders regarding the requirements, systems and procedures which will meet process objectives.
  - b) Putting into place and updating policies, requirements, systems and procedures for managing land management programs to meet policy objectives.
  - c) Resolving Framework Issues by identifying and resolving issues relating to policies, requirements, systems and procedures.
  - d) Reviewing, compiling and submitting regional inputs to the end users of submissions.
- 6.4 Regions are responsible for supporting headquarters lands by maintaining an appropriate framework and managing regional land management funds according to that framework. This involves:
- a) **Performing Funding Management Functions:** All of the forecasting, budgeting and payment activities for which regions are responsible.
  - b) **Supporting First Nations:** Ensuring that regional funding management practices support First Nation land management functions.
  - c) **Resolving Operational Issues:** Identifying and resolving issues related to First Nation concerns and the operation of the framework within the region.
- 6.5 The First Nations are responsible for providing appropriate inputs. The primary responsibility of the First Nation is to advise the department on framework requirements and provide eligibility and funding data to the department. This data is provided through funding applications and the reports specified in Directive 11-05.

## ANNEX A MULTI-YEAR OPERATIONAL PLAN CHECKLIST

The following steps must be performed by the organization indicated:

1	<p><b>INAC Headquarters:</b> Consults with finance regarding planning assumptions and MYOP input requirements.</p>	
2	<p>Prepares and forwards to regions, a request for regional updates to the MYOP and Land Management Transfer Strategy comprising:</p> <ul style="list-style-type: none"> <li>a) The forecast number of First Nations and costs over 3 years in the existing MYOP and plan</li> <li>b) Planning guidelines and input instructions regarding assumptions and forms to be used</li> <li>c) A letter from the Director, Lands requesting input to the MYOP and strategy</li> </ul>	
3	<p><b>INAC Field:</b> Consults with First Nations regarding possible entry into this program.</p>	
4	<p>Prepares and forwards to First Nation a request for forecast of funding requirements comprising:</p> <ul style="list-style-type: none"> <li>a) Up to date funding application forms and instructions</li> <li>b) Guidelines regarding the forecasting of transactions to be developed</li> </ul>	
5	<p><b>First Nation:</b> Reviews its records to identify all registered interests eligible for funding AND which:</p> <ul style="list-style-type: none"> <li>a) Will still be in effect as of the coming December 31st, OR</li> <li>b) Were registered after the previous January 1st and will expire prior to the coming December 31st</li> </ul>	
6	<p>Obtains the following information for each registered interest to be funded:</p> <ul style="list-style-type: none"> <li>a) The registration number, since only registered interests can be funded</li> <li>b) The type of interest such as a headlease, direct lease, sublease, permit or individual holding</li> <li>c) The type of activity such as agricultural, commercial, residential, leisure or industrial</li> </ul>	
7	<p>Makes a list of all transactions likely to result in a registered interest by the coming December 31st.</p>	
8	<p>Completes Form 1, except for Part 2 using <b><i>An Executive's Guide to the Land Management Funding Formula.</i></b></p>	

9	<p>Submits an estimate of funding required to the regional or district office by July 31st which includes:</p> <ul style="list-style-type: none"> <li>a) A list of registered interests as described in Step 06</li> <li>b) A list of transactions under development as described in Step 07</li> <li>c) The completed Form 1</li> </ul>	
10	<p><b>INAC Field:</b> Checks the estimate of funding required to verify that:</p> <ul style="list-style-type: none"> <li>a) All interests included on the Form 1 and accompanying list are eligible for funding</li> <li>b) All interests have been included under the correct interest type on Form 1</li> <li>c) All calculations are correct</li> </ul>	
11	<p>Prepares and submits to headquarters by August 1st an estimate of funding required which includes:</p> <ul style="list-style-type: none"> <li>a) A list of First Nations expected to be in each program in each of the 3 forecast years</li> <li>b) Applications for funding for new entries (See Initial Entry)</li> <li>c) Estimates of funding required for all First Nations to be funded</li> </ul>	
12	<p><b>INAC Headquarters:</b> Reviews MYOP guidelines from Finance Branch and resolves any questions.</p>	
13	Prepares a schedule for MYOP inputs in accordance with the deadlines set by Finance.	
14	<p>Reviews regional submissions to verify that:</p> <ul style="list-style-type: none"> <li>a) All First Nations eligible for funding have been included in the submission</li> <li>b) Each estimate is complete and has all of the elements described in Step 09</li> </ul>	
15	Identifies any program or funding formula changes requiring Treasury Board Authority.	
16	Consults internally and with Treasury Board on issues related to authorities and incremental funds.	
17	<p>Determines input to the Multi-Year Operational Plan submission comprising:</p> <ul style="list-style-type: none"> <li>a) Any requests for authority to change the program or funding formula which may be necessary</li> <li>b) Estimates of funding requirements for the next three years including price and volume adjustments</li> <li>c) An explanation and justification for authorities and incremental funds being sought</li> <li>d) Supporting data such as lists of First Nations being funded and transaction volumes</li> </ul>	
18	Completes the narrative and financial input forms provided by Finance Branch.	



19	Reviews, revises and updates the narrative for Part III of the Estimates by: a) Ensuring program achievements and plans are reflected in the departmental overview b) Updating the portions relating to transfer of land management programs c) Ensuring headquarters and regional lands staff are given an opportunity to identify priorities and issues	
20	Updates the Transfer of Land Management Plan as an annex to the MYOP input.	
21	Routes input to the Multi-Year Operational Plan for review by: a) Director General, Lands and Environment b) Director, Resource Management and Reporting c) Director, Financial Analysis and Program Review	
22	Prepares and forwards a briefing for sector management regarding MYOP input and related issues.	
23	Resolves any issues related to the review of MYOP issues and amends the strategy and plan.	
24	Forwards departmental Multi-Year Operational Plan submission to Treasury Board by October 31st.	

## ANNEX B BUDGET ALLOCATION AND ADMINISTRATION CHECKLIST

The following steps must be performed by the organization indicated:

1	<p><b>First Nation:</b> Reviews its records to identify all registered interests eligible for funding AND which:</p> <p>a) Were still in effect as of the previous December 31st, OR b) Were registered after the previous January 31 and expired prior to the previous December 31st</p>	
2	<p>Obtains the following information for each registered interest to be funded:</p> <p>a) The registration number, since only registered interests can be funded b) The type of interest such as a headlease, direct lease, sublease, permit or individual holding c) The type of activity such as agricultural, commercial, residential, leisure or industrial d) For First Nations with delegations, the registration date of interests registered in the past 12 months</p>	
3	<p>Completes Form 1 using the instructions in <b><i>An Executive's Guide to the Land Management Funding Formula.</i></b></p>	
4	<p>Submits an application for funding to the regional or district office by February 1st which includes:</p> <p>a) A list of registered interests as described in Step 02 b) The completed Form #1</p>	
5	<p><b>INAC Field:</b> Checks the application for funding to verify that:</p> <p>a) All interests included on the form 1 and accompanying list are eligible for funding b) All interests have been included under the correct interest type on Form 1 c) All calculations are correct</p>	
6	<p>Checks its records to verify that:</p> <p>a) The First Nation continues to meet all eligibility requirements listed under steps 15, 16 and 17 b) All required program reports have been received c) The First Nation has complied with the terms and conditions of delegation and/or funding</p>	
7	<p>Resolves any discrepancies regarding eligibility for funding or the amount of eligible funding.</p>	
8	<p>Completes Parts 8 and 9 of Form 1 and signs Part 9.</p>	
9	<p>Forwards all completed applications to headquarters by February 10th.</p>	

10	<p><b>INAC Headquarters:</b> Reviews regional submissions to verify that:</p> <ul style="list-style-type: none"> <li>a) All First Nations eligible for funding have been included in the submission</li> <li>b) Amounts shown are consistent with projections included in the MYOP</li> <li>c) Each application is complete and has all the elements described in Steps 05 to 08</li> <li>d) Part 9 of each Form 1 has been completed and signed</li> </ul>	
11	Reviews some applications on a sample basis using the criteria listed under Steps 05 to 08.	
12	Resolves any discrepancies regarding First Nation or regional budgets.	
13	Approves regional budgets through the Director General, Lands and Environment by February 15.	
14	Transfers approved budgets to regions through the Resource Management and Reporting Directorate.	
15	Notifies regions of the amounts transferred for each First Nation and related details by March 1st.	
16	<p>Reviews program terms and conditions in National Model Comprehensive Funding Arrangement for:</p> <ul style="list-style-type: none"> <li>a) Consistency with current departmental policy</li> <li>b) Consistency with the terms or delegation</li> <li>c) Adequacy of reporting provisions</li> <li>d) Compliance with the most recent relevant legal opinions and court decisions</li> </ul>	
17	Prepares any required revisions to the program terms and conditions in the National Model.	
18	<p>Routes proposed revision for review by:</p> <ul style="list-style-type: none"> <li>a) Regional Managers, Lands</li> <li>b) Director, Transfer Payments</li> </ul>	
19	Forwards approved program terms and conditions to regions in conjunction with the National Model.	
20	<p><b>INAC Field:</b> Draws up and sends First Nation funding arrangement using regional model specifying:</p> <ul style="list-style-type: none"> <li>a) Services to be delivered in accordance with delegation, <i>Indian Act</i> and manual</li> <li>b) Lease billing and quarterly financial reporting requirements</li> <li>c) Transaction reporting requirements</li> </ul>	
21	Explains any changes in budget and terms and conditions to the First Nation (See <b>Annual Budget</b> ).	

22	<b>First Nation:</b> Prepares a cash flow or expenditure plan as required by the funding arrangement.	
23	Reviews and signs the funding arrangement.	
24	Returns the cash flow plan and signed arrangement to the regional or district office.	
25	<b>INAC Field:</b> Verifies that the First Nation remains eligible for funding.	
26	Review through the funding services office, the signed arrangement and cash flow plan.	
27	Authorizes the initial advance to the First Nation.	
28	Monitors eligibility for further payments by verifying that (See <b>Monitoring and Remedial Action</b> ):  a) The First Nation remains eligible for funding b) The First Nation continues to comply with the terms and conditions of sfunding c) Any required adjustments to eligible funding or the size of a particular payment are implemented	
29	Authorizes subsequent advances and the final payment to the First Nations in accordance with:  a) The terms and conditions of the funding arrangement b) Departmental policies and guidelines regarding the release of transfer payments	

## DIRECTIVE 11-5 MONITORING AND REMEDIAL ACTION

### 1.0 Purpose

1.1 This directive explains how the department will monitor land management functions delegated to First Nations under Sections 53 and/or 60 of the *Indian Act*. It does not apply to First Nations being funded for land management without delegated authority. It also explains how the department will deal with problem situations. You should read this directive for information on:

- a) **Policy:** It states the principles and requirements governing monitoring and remedial action for the delegated land management (53/60) program.
- b) **Procedures:** It outlines the steps in the monitoring process. It also describes the remedial action to correct problems.

### 2.0 General

2.1 Monitoring benefits both First Nations and the Department. A program of comprehensive and consistent monitoring is important because:

- a) **Monitoring helps to manage risk.** First Nations with delegations are, in a sense, acting for the department. The department may therefore, to some extent, be accountable for their actions. Monitoring helps ensure that First Nations follow departmental policies and procedures. This reduces the risk of serious problems and improves the department's ability to defend First Nation actions.
- b) **Monitoring helps improve service.** Monitoring provides First Nations with valuable information regarding the effectiveness of their land management operations. This information can be used to improve the quality of service.

### 3.0 Authorities

3.1 Treasury Board Minutes governing monitoring and remedial action are:

- a) Recipient Indebtedness, May 10, 1984: Governs remedial action in the case of serious deficits or a denial of opinion by an auditor.
- b) Alternative Funding Arrangements, June 26, 1986: Governs remedial action under an alternative funding arrangement.
- c) Devolution Plan, November 27, 1986: Amends the 1984 authority.

- d) Transfer Payments, July 26, 1989: Governs remedial action under a comprehensive funding arrangement.
- 3.2 Model funding arrangements governing remedial action are:
- a) National Model for alternative funding arrangements (AFAs).
  - b) National Model for comprehensive funding arrangements (CFAs).
- 3.3 Departmental directives governing monitoring and remedial action are:
- a) Financial Policies and Procedures Manual, Volume 3, Chapter 5.6, Funding Arrangements - Monitoring of Compliance
  - b) Financial Policies and Procedures Manual, Volume 3, Chapter 5.8, June 1993, Third Party Managers
  - c) Financial Policies and Procedures Manual, Volume 3, Chapter 5.9, Funding Arrangements - Remedial Action
- #### 4.0 Policy
- 4.1 The department is responsible for ensuring that First Nations adhere to the terms of delegation and the funding arrangement:
- a) **Where a First Nation is funded for land Management**, its lands program must be monitored. At a minimum, this will include reviewing reports, registered documents and on-site operations.
  - b) **Monitoring should vary with the situation.** Regions should vary the degree of monitoring to fit the risks involved in each case. They may not exempt First Nations from monitoring. However, they may increase or decrease the level of detail and frequency of reports and site reviews.
  - c) **Regions must ensure that at least one report is submitted and reviewed each year.** The regions must conduct site reviews at least once every three years.
- 4.2 The department has the right to take remedial action in any one of the following four situations:
- a) **Serious financial management problems:** The department may take remedial action whenever an auditor refuses to express an opinion on the First Nation's financial statements or indicates that there is a major deficit.

- b) **Third party claims:** Remedial action should be considered whenever there are third party claims against the First Nation or the Crown arising from an arrangement.
- c) **Dangers to health and safety:** Remedial action is required whenever the health and safety of any group or individual is threatened as a result of programs funded under the arrangement.
- d) **Defaults on terms and conditions:** The department may initiate remedial action whenever the terms and conditions of the funding arrangement and the delegation instrument are not met.

4.3 While the department is responsible for taking remedial action, it is also anxious to avoid undue and unnecessary interference in the internal affairs of First Nations. Consequently, departmental policy is governed by the following principles:

- a) **Issues should be resolved cooperatively:** Where possible, situations requiring remedial action will be addressed informally and cooperatively.
- b) **Remedial action is a last resort:** Where a cooperative approach proves to be impossible or ineffective, the remedial action clauses of the funding arrangement should be invoked.

**Note: Health and safety is an exception.** Where there is an immediate threat to health and safety, the department will take immediate remedial action without regard to the above two principles.

4.4 Departmental policy specifies several remedial action options. These are discussed in detail in the departmental directives listed in clause 4.3 of this directive and should not be carried out before consultation with the Finance and Funding Services staff in the districts or regions. Some of these other options may include:

- a) **Withholding Discretionary Funds:** In some cases, funding for non-essential services may be withheld pending correction of the problem.
- b) **Third Party Management:** A second option is to arrange for the service being funded by the department to be managed by a third party such as a mutually agreed on independent contractor until such time as the problem is resolved.
- c) **Termination:** The most extreme remedial option is the termination of the entire funding arrangement.

4.5 Where First Nations have delegated land management authority, withdrawal of these authorities is another option. In some cases a temporary problem may prevent a First Nation from exercising its delegated authorities. The department may choose to **suspend** the delegation for a given period of time. In cases where there is a major problem, long term deficiency or significant risk, the delegation may be **revoked**.

## 5.0 Process

5.1 This section provides an overview of the processes for monitoring First Nation land management operations and for remedial action where problems arise. Detailed procedures and checklists are included in Annex A of this directive.

5.2 Monitoring involves the following major steps:

- a) **First Nations prepare and submit reports.** These are completed and forwarded in accordance with the requirements of the terms of delegation and the funding arrangement.
- b) **Departmental staff review reports and determine if remedial action is required.** This includes participation in audit reviews and the review of documents submitted for pre-audit or registration.
- c) **Departmental staff review First Nations records, systems and procedures and determine whether remedial action is required.**

5.3 Remedial action involves the following major steps:

- a) **Problem identification:** Departmental staff identify a situation which may require remedial action and verify this possibility with First Nation.
- b) **Informal resolution:** The department and First Nation work together informally to resolve the problem without invoking the remedial action clause of the funding arrangement.
- c) **First Nation action:** First Nation develops approaches to resolving the problem and advises the department of its plans and progress.
- d) **Departmental action:** Where the First Nation is unwilling or unable to resolve the problem the department may take remedial action. This may range from co-management to revocation of the funding arrangement. It may also include withdrawal or suspension of the delegation.

## 6.0 Implementation

6.1 Responsibility for the implementation of this directive will be as follows:

- a) Regions and Districts lands staff are responsible for monitoring and for recommending remedial action in consultation with Funding Services and Finance.
- b) Headquarters staff are responsible for monitoring regional implementation of this policy and reviewing regional recommendations for suspension or revocation of delegated land management authorities.



- 6.2 This directive has been effect since April 1, 1995. A site inspection must have been completed for every First Nation with a delegated land management authority within three years of the effective date of their delegation.
- 6.3 First Nations with delegations should be asked to submit Annual reports for the fiscal year ending March 31 by June 30 of the preceding year. They will be free to determine the format and structure of their reports provided they cover the points outlined in the next paragraph of this directive.
- 6.4 Annual reports should address workload compliance and entry criteria. Annual reports submitted by First Nations should at a minimum include:
- a) **Workload Statistics:** Where data is available, reports should state the actual number of hours spent on developing and administering registered interests funded by the department. These include leases, permits and individual holdings.
  - b) **Compliance Issues:** Reports must disclose any compliance issues related to leases and permits in place which have been identified in the course of the year. Reports should focus on issues related to payments and the environment.
  - c) **Entry Criteria:** Reports must demonstrate that First Nations continue to meet the entry criteria for the program as outlined in the 1993-1994 management regime referenced at the end of this directive.

## 7.0 References

- 7.1 In addition to the documents listed in the **Authorities** section of this directive the following references may also be consulted:
- a) Interim Policy Directive – Delegated Land Management Program: Memorandum from Director, Lands to Regional Directors, Lands, Revenues and Trusts dated February 10, 1993.
  - b) 1993-1994 Management Regime – Land Management Devolution: Memorandum from Director Lands, to Regional Directors, Lands Revenues and Trusts dated May 21, 1993.

## ANNEX A MONITORING AND REMEDIAL ACTION CHECKLIST

The following steps should be carried out by the organizations or individuals indicated:

1	<p><b>First Nation:</b> Prepares and submits to the department the following information required by the program:</p> <ul style="list-style-type: none"> <li>a) An annual report of operations</li> <li>b) Notice of rental arrears, outstanding permit fees and breaches of terms of leases or permits</li> <li>c) A form 1 showing eligibility for funding and eligible registered interests (See <b>Annual Budget</b>)</li> <li>d) An annual audit report which includes an audit of all lease and permit revenues AND in the case of First Nations with delegated authorities,</li> <li>e) Form and terms of standard or individual instruments to be executed under their delegation</li> <li>f) Duplicate original of all documents executed or approved under their delegation for registration</li> <li>g) A quarterly, aged listing of rentals receivable and collections</li> </ul>	
2	<p><b>INAC Field:</b> Reviews all reports and information and verifies that the First Nation:</p> <ul style="list-style-type: none"> <li>a) Remains eligible for funding</li> <li>b) Has forwarded all required reports and information to the department</li> <li>c) Is exercising only those authorities which have been delegated to it</li> <li>d) Is complying with departmental policies and guidelines governing the functions being performed</li> </ul>	
3	<p>Participates in the annual audit review process and verifies that the First Nation:</p> <ul style="list-style-type: none"> <li>a) Has performed the functions being funded under the funding arrangement</li> <li>b) Properly accounted for all monies received in the exercise of its delegated authorities</li> <li>c) Has accurately reported the amount of any surplus or deficit for the program which was funded</li> </ul>	
4	<p>Conducts site reviews at least once every three years to confirm that the First Nation:</p> <ul style="list-style-type: none"> <li>a) Has adequate records in place</li> <li>b) Has adequate land management systems</li> <li>c) Has adequate records and systems for the administration of revenues</li> <li>d) Is complying with the terms of the delegation and funding arrangement</li> </ul>	

5	Identifies compliance issues and attempts to address these informally with the First Nation.	
6	Where an issue cannot be resolved informally, has Lands and Funding Services review the situation.	
7	Requests the First Nation to respond on the issue within a specified period not to exceed 30 days.	
8	<b>First Nation:</b> Responds to departmental concerns within a specified period not to exceed 30 days.	
9	Where it deems appropriate, forwards to the department an action plan to resolve the issue.	
10	Where it deems appropriate, works with the department to resolve the issue. <b><i>In cases where the department and First Nation are unable to resolve the issue only:</i></b>	
11	<b>INAC Field:</b> Considers the need for remedial action on the basis of the following factors: a) The severity of the problem b) The likelihood the situation will continue if no action is taken c) The risks to the health and safety of the community if no action is taken d) The potential for liability on the part of the Crown if no action is taken	
12	Advises the First Nation that remedial action is being considered.	
13	Routes recommendations for remedial action for review to: a) Regional Director, Lands and Trust Services b) Director responsible for Funding Services c) Associate Regional Director General d) Where revocation of a delegation is being recommended, the regional Justice office e) Where revocation of a delegation is being recommended, the Director, Lands in Headquarters	
14	Notifies the First Nation of the remedial action being considered and offers it a chance to respond.	
15	<b>First Nation:</b> Reviews the recommended remedial action and if it wishes, responds to INAC Field.	
16	<b>INAC Field:</b> Reviews any First Nation responses.	
17	Discusses the proposed remedial action and response with First Nation.	

18	Decides on a course of remedial action which may include one or more of the following:  a) Institution of co-management involving an independent individual or firm and the First Nation b) Appointment of a third party to manage the affairs of the First Nation on an interim basis c) Withholding of funds payable under the funding arrangement d) Termination of the arrangement	
	e) Where the Director, Lands in headquarters concurs, revocation or suspension of a delegation	
19	<b>Where a revocation or suspension of the delegation has been requested:</b> Drafts and sends an order and letter of revocation or letter of suspension of the delegated authority to headquarters.	
20	<b>INAC Headquarters:</b> Determines whether revocation or suspension is justified in the circumstances.	
21	Where a revocation or suspension is recommended, reviews and finalizes the orders and letters drafted by region and recommends them for approval.	
22	Sends the drafts for review by: a) Justice b) Finance	
23	Makes responses and revisions based on comments from Justice and Finance.	
24	Prepares final documents for approval and sign off by:  a) Justice b) Finance c) Assistant Deputy Minister, Lands and Trust Services d) Assistant Deputy Minister, Corporate Services e) Associate Deputy Minister, Indian Affairs and Northern Development f) Minister, Indian Affairs and Northern Development	
25	Forwards order to Privy Council Office for approval and responds to their concerns.	
26	Reviews the order when received to verify that it is correct and identify any special provisions.	
27	Forwards the signed ministerial letter and order to the regional office.	
28	<b>INAC Field:</b> Implements remedial action in accordance with the terms and conditions of the funding arrangement and the applicable departmental policies and guidelines.	



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## DIRECTIVE 12-1 GENERAL REQUIREMENTS

### 1.0 Purpose

- 1.1 This directive provides general information on environmental requirements for land activities and transactions on First Nation lands.

### 2.0 General

- 2.1 Activities on First Nation lands must be carried out in an environmentally responsible manner. Land instruments must contain clauses that ensure the requirements of all applicable laws, regulations and standards are met or exceeded.
- 2.2 In the absence of federal environmental standards applicable on First Nation lands, the standards of the province in which the reserve is located or the best environmental practices should be applied.
- 2.3 INAC Regional Officers are responsible for ensuring that an appropriate environmental management process is carried out prior to the preparation of land instruments, such as (Environmental Assessment (EA), Environmental Site Assessment (ESA), etc.). Table 12-1 demonstrates the relationship between the purpose of an instrument and the required environmental management process.

**Table 12-1**

<b>Instrument Purpose</b>	<b>Environmental Management Process</b>
New Project/Transaction	Environmental Site Assessment and/or Environmental Assessment
Transferring or renewing land instruments	Environmental Site Assessment/Environmental Audit/Land instrument terms and conditions relating to Environmental Assessment/Land conformance/ Compliance file
Cancellation/Expiration	Environmental Site Assessment

- 2.4 All written recommendations resulting from an environmental management process must be considered by INAC Regional Officers during any decision making related to a land activity and/or land transaction.
- 2.5 Where land tenure is required for a project, the proponent of the project should be responsible for funding the appropriate environmental management process.

- 2.6 Except in the case of Certificates of Possession, terms and conditions of land instruments granted by the department must require compliance with all recommendations for environmental stewardship, as identified in a report for the environmental management process carried out in relation to the instrument.
- 2.7 Except in the case of Certificates of Possession, land instruments require decommissioning clauses that identify the need for an ESA to be completed by the proponent in accordance with Directive 12-4.
- 2.8 Except in the case of Certificates of Possession, land instruments must contain clauses requiring the proponent to submit periodic environmental monitoring reports and/or annual audits as appropriate. Regional Officers must ensure that the monitoring reports or audit results are tracked in the Environmental Stewardship Strategy Information Management System (ESSIMS). Regional Officers may seek advice from the Environment Directorate at INAC Headquarters to ensure monitoring reports or audits meet requirements.
- 2.9 Where two or more sectors are involved in the decision making for a project or activity occurring on First Nation lands, the environmental clauses within their respective agreements must be harmonized.
- 2.10 Provisions for ongoing monitoring of sites with activities posing a high degree of environmental risk due to the operation or nature of the business (e.g. storage of chemicals or fuel, operations that create a large waste stream) must be incorporated into funding arrangements, and periodic site audits must be carried out to ensure compliance with the environmental provisions of the land instruments.
- 2.11 Any mitigative measures, monitoring, or enforcement requirements (including periodic environmental audits, if applicable) which are identified in an EA must be incorporated into the terms and conditions of the land instrument to be granted by the department.
- 2.12 Where identified in an EA or ESA, terms and conditions may require monitoring of water quality, air quality, soil quality and fuel tanks on First Nation lands or facility auditing schedules.
- 2.13 Environmental terms and conditions of a land instrument must be met before transfers, assignments or renewals are issued. The review of the environmental terms of the instrument must be undertaken by Regional Officers or may require a third party to audit the performance of the project.



- 2.14 In addition to technical information, Regional Officers may consider using any other information concerning a parcel of land for decision making purposes.
- 2.15 Regional Officers are responsible for entering all environmental reports, monitoring and compliance information and any other pertinent environmental information related to land activities and/or land transactions onto departmental land files.
- 2.16 Land instruments must identify the environmental roles and responsibilities of the parties to the transaction.
- 2.17 ESSIMS must be used to identify and track all environmental information related to land activities and transactions. Cooperation and collaboration of Regional Staff will ensure the accuracy and usefulness of the data within ESSIMS. The Environment Directorate, HQ will provide basic training and guidance on the use of ESSIMS.
- 2.18 Regional Offices may use NetLands in the management of land transactions on reserve lands. Netlands contains an ESSIMS index number data field thus providing a link between the two systems. NetLands can be used to monitor compliance with the terms and conditions set out in land instruments, as well as environmental requirements, breaches, disputes and the tracking of revenues related to land management. NetLands is used to track activities relevant to all aspects of land management, whereas ESSIMS is used specifically to track the environmental information related to land activities.

### 3.0 Authorities

- 3.1 The authority for these directives is derived from federal environmental legislation and central agency/departmental policy requirements including:
- *Canadian Environmental Assessment Act (CEAA)* and its Regulations
  - *Canadian Environmental Protection Act (CEPA)* and its Regulations
  - *Species at Risk Act (SARA)*
  - Environmental Stewardship Strategy, 2002
  - Environment Policy, Indian and Inuit Affairs Program, Oct. 2003
  - Deputy Minister's Memorandum on Environmental Stewardship for the Indian and Inuit Affairs Program, Oct. 31, 2004
  - Indian and Inuit Affairs Business Line (IIABL) Environmental Management Directive, 2005
  - *Fisheries Act*
  - *Migratory Birds Convention Act*

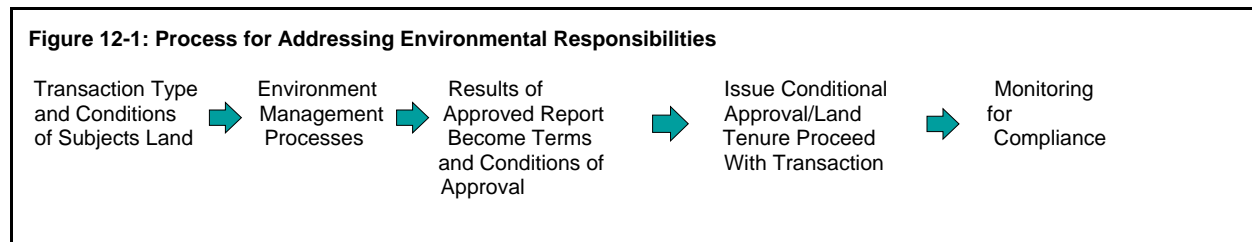
For more detail refer to Annex 12-C.

## 4.0 Policy

4.1 Regional Officers are required to ensure the application of appropriate environmental management processes as they relate to land activities and land transactions. Where applicable, Regional Officers are required to incorporate environmental management processes into each land instrument they issue.

## 5.0 Process

5.1 Figure 12-1 provides a general process overview for addressing environmental responsibilities.



5.2 Regional Officers must ensure that the necessary environmental management process is undertaken.

5.3 Regional Officers are to review the recommendations, conclusions or baseline information contained in environmental reports completed for a project. Advice and assistance in this review is available from the Environment Directorate at HQ.

5.4 Where a decision has been made to proceed with the project, the Regional Officers must ensure terms and conditions for the instrument are developed including the requirement to undertake recommended monitoring programs, record keeping, testing and or regular auditing.

5.5 Regional Officers must refer to the terms and conditions of an instrument prior to drafting or issuing a renewal, assignment or transfer of that instrument.

5.6 The application of the various assessments that comprise an environmental management process are described in the remainder of this chapter in the form of directives.

## 6.0 References

6.1 Refer to Chapter 2 (Choosing the Right Transaction: Authorities and Conditions) and Chapter 8 (Administering Leases and Permits) of this manual.

## DIRECTIVE 12-2 ENVIRONMENTAL REQUIREMENTS FOR LAND INSTRUMENTS

### 1.0 Purpose

- 1.1 This directive provides information on choosing the appropriate environmental management process required to evaluate the environmental aspects of a land activity or land transaction.

### 2.0 General

- 2.1 Land instruments may only allow land uses or activities that are consistent with the environmental condition of the subject parcel of land as determined through an Environmental Site Assessment (ESA).
- 2.2 Prior to a land designation, Regional Officers must obtain an ESA to ensure that the land in question is capable of supporting the contemplated land use.
- 2.3 Land instruments required as a result of a project initiated by another sector will not be issued until after Regional Officers have reviewed the ESA report.
- 2.4 Where land instruments are required and no other sector is involved in funding or approvals, Regional Officers are required to ensure that an Environmental Assessment (EA) is completed according to the *Canadian Environmental Assessment Act (CEAA)* (refer to Directive 12-3).
- 2.5 Land instruments, or the interest granted in land, may not be transferred, assigned or renewed unless:
- a) the environmental terms and conditions contained in the existing instrument have been complied with; or
  - b) an ESA or Environmental Audit is carried out in accordance with Directive 12-4 or 12-5 and appropriate environmental management processes put in place, in the event that the existing land instrument does not contain environmental terms and conditions.
- 2.6 Usually, a subsection 20(1) *Indian Act* allotment does not incorporate a project proposal for the future use of allotted land. (Allotments without a project approval attached are not subject to an EA under the *CEAA*). However, where the allotment does include a project proposal, Regional Officers must determine whether the department requires an EA under the *CEAA*. If so, the EA must be conducted prior to Ministerial approval of the allotment.

### 3.0 Authorities

3.1 The authority for these directives is derived from federal environmental legislation and central agency/departmental policy requirements including:

- *Canadian Environmental Assessment Act (CEAA)* and its Regulations
- *Canadian Environmental Protection Act (CEPA)* and its Regulations
- *Species at Risk Act (SARA)*
- Environmental Stewardship Strategy, 2002
- Environment Policy, Indian and Inuit Affairs Program, Oct. 2003
- Deputy Minister's Memorandum on Environmental Stewardship for the Indian and Inuit Affairs Program, Oct. 31, 2004
- Indian and Inuit Affairs Business Line (IIABL) Environmental Management Directive, 2005
- *Fisheries Act*
- *Migratory Birds Convention Act*

For more detail refer to Annex 12-C.

3.2 Sections of the *Indian Act* that are pertinent to this directive include:

- Set aside for general use, subsection 18(2);
- Allotment, subsection 20(1);
- Lands taken for public purposes, section 35;
- Leasing, subsection 53(1);
- Designation, subsection 38(2);
- Permits, subsections 28(2) and 58(4);
- Agricultural Leasing, subsection 58(1);
- Locatee leases, subsection 58(3)

3.3 *Indian Mining Regulations, Indian Timber Regulations, Indian Oil & Gas Regulations and Indian Reserve Waste Disposal Regulations.*

### 4.0 Policy

4.1 Regional Officers are required to ensure the application of appropriate environmental management processes as they relate to land activities and land transactions. Where applicable, Regional Officers are required to incorporate environmental management processes into each land instrument they issue.

### 5.0 Process

5.1 Determine if there is a project as defined by *CEAA*.

5.2 Where a project can be identified, determine who is the proponent of the proposed project.

a) Other sector projects

Regional Officers must have a copy of the EA or the ESA completed for the other sector and reviewed before a decision on issuing land instruments can be made. Refer to Directives 12-3 and 12-4.

b) Third party projects

Regional Officers are required to ensure an EA or an ESA is completed and reviewed for the project. Refer to Directives 12-3 and 12-4.

c) First Nation Council or corporation projects

Regional Officers are required to ensure an EA or an ESA is completed and reviewed prior to issuing a land instrument that will facilitate initiation of the proposed project. Refer to Directives 12-3 and 12-4.

d) First Nation member project

Regional Officers are required to ensure an EA or an ESA is completed and reviewed prior to issuing a land instrument that will facilitate initiation of the proposed project. Refer to Directives 12-3 and 12-4.

5.3 Terms and conditions must be included in the land instrument based on the recommendations of the EA or ESA report. Refer to directive 12-3.

5.4 Draft the required land instrument.

## 6.0 References

- 6.1
- a) Refer to Chapter 2 (Choosing the Right Transaction: Authorities and Conditions) and Chapter 8 (Administering Leases and Permits)
  - b) Directive 12-3 Environmental Assessments
  - c) Directive 12-4 Environmental Site Assessments
  - d) Directive 12-5 Environmental Audits

## DIRECTIVE 12-3 ENVIRONMENTAL ASSESSMENTS

### 1.0 Purpose

- 1.1 This directive provides Regional Offices with an overview of the Environmental Assessment (EA) process as per the *Canadian Environmental Assessment Act (CEAA)* and identifies those activities and/or transactions to which the EA process applies.

### 2.0 General

- 2.1 An EA as per the *CEAA* is required for all proposed projects on First Nation lands.
- 2.2 The *CEAA* sets out the responsibilities and procedures for the EA of proposed projects involving the Federal Government. See Annex A, *CEAA* Triggers and Project Examples on First Nations Lands.
- 2.3 An EA is undertaken to identify potentially adverse environmental effects of a proposed activity and to identify ways to prevent, correct or otherwise minimize those effects.
- 2.4 If significant effects cannot be prevented, corrected or minimized, a proposed project cannot proceed.
- 2.5 Regional Officers must ensure that an EA is undertaken for all proposed projects on First Nation lands. The Regional Officers must provide a project proponent with the EA Terms of Reference (TOR). The EA must be carried out by a qualified assessor.
- 2.6 Where appropriate, the consideration of community knowledge and Aboriginal Traditional Knowledge in conducting an EA is strongly encouraged. See reference in Directive 12-3, 6.1 (g).
- 2.7 Where a project proponent is a First Nation Council or a First Nation corporation, the proponent must, at the request of the department, provide an EA to the department and the First Nation, which includes, among other things, the environmental impacts of its project and any proposed mitigation.
- 2.8 Where a project proponent is a First Nation Council or a First Nation corporation, the proponent must, at the request of the department, provide an EA to the department which includes the environmental impact of its project and any proposed mitigation.

- 2.9 Where a project proponent is a First Nation member, the proponent must, at the request of the department, provide an EA to the department which includes, among other things, the environmental impact of its project, and any proposed mitigation.
- 2.10 Where a department sector is the proponent of a project, that sector must arrange an EA and must provide the First Nation with a copy of the EA. The Regional Office must make its EA decision before the land instrument can be finalized.
- 2.11 To ensure environmental stewardship, First Nations that have authority to approve land transactions under sections 53 and 60 of the *Indian Act*, while not required to do so by legislation, must examine the environmental status of the lands involved and identify environmental issues.
- 2.12 While the Regional Officers must ensure that the EA is completed where required, the proponent will usually arrange and fund the actual EA.
- 2.13 The Environmental Stewardship Information Management System (ESSIMS) can assist in identifying the need for an EA and will be used by Regional Officers to document and track EAs on First Nation lands.
- 2.14 Regional Officers are responsible for providing a TOR for an EA to a proponent First Nation or to any other party requesting the TOR.
- 2.15 The historical and current land use of an area proposed for use must be considered in the EA to ensure that use does not occur on previously contaminated lands, environmentally sensitive habitat protected by the *Species At Risk Act (SARA)* or areas posing other environmental concerns.
- 2.16 With respect to projects involving environmentally sensitive land, as identified under *SARA*, Regional Officers must notify the Competent Minister (as defined by *SARA*) and ensure that mitigative measures are consistent with the Recovery Strategy and Action Plan for the species. In an area of known critical habitat, Regional Officers cannot issue land instruments until the proponent has received written permission from the Competent Minister to proceed.
- 2.17 Completed EAs will be subject to review and sign-off by Regional Managers.

### 3.0 Authorities

3.1 The authority for these directives is derived from federal environmental legislation and central agency/departmental policy requirements including:

- *Canadian Environmental Assessment Act (CEAA)* and its Regulations
- *Canadian Environmental Protection Act (CEPA)* and its Regulations
- *Species at Risk Act (SARA)*
- Environmental Stewardship Strategy, 2002
- Environment Policy, Indian and Inuit Affairs Program, Oct. 2003
- Deputy Minister's Memorandum on Environmental Stewardship for the Indian and Inuit Affairs Program, Oct. 31, 2004
- Indian and Inuit Affairs Business Line (IIABL) Environmental Management Directive, 2005
- *Fisheries Act*
- *Migratory Birds Convention Act*

For more detail refer to Annex 12-C.

3.2 The *Canadian Environmental Assessment Act*

- The *Law List Regulations*; SOR/94-636
- The *Inclusion List Regulations*; SOR/94-637
- *Comprehensive Study List Regulations*; SOR/94-638
- *Exclusion List Regulations*; SOR/94-639
- *Federal Authorities Regulations*; SOR/96-280

### 4.0 Policy

4.1 Environmental Assessments will be conducted for proposed projects in accordance with the *CEAA*.

### 5.0 Process (See Figure 12-2)

5.1 Determine whether or not there is a project as defined by *CEAA*. (Refer to Annex 12-A *CEAA* Triggers and Project Examples on First Nation Lands and Part IX of *CEAA Inclusion List Regulations*). If there is a project, undertake the following steps.

5.2 Enter the project description into Environmental Stewardship Strategy Information Management System (ESSIMS). (Refer to departmental training manual on ESSIMS).

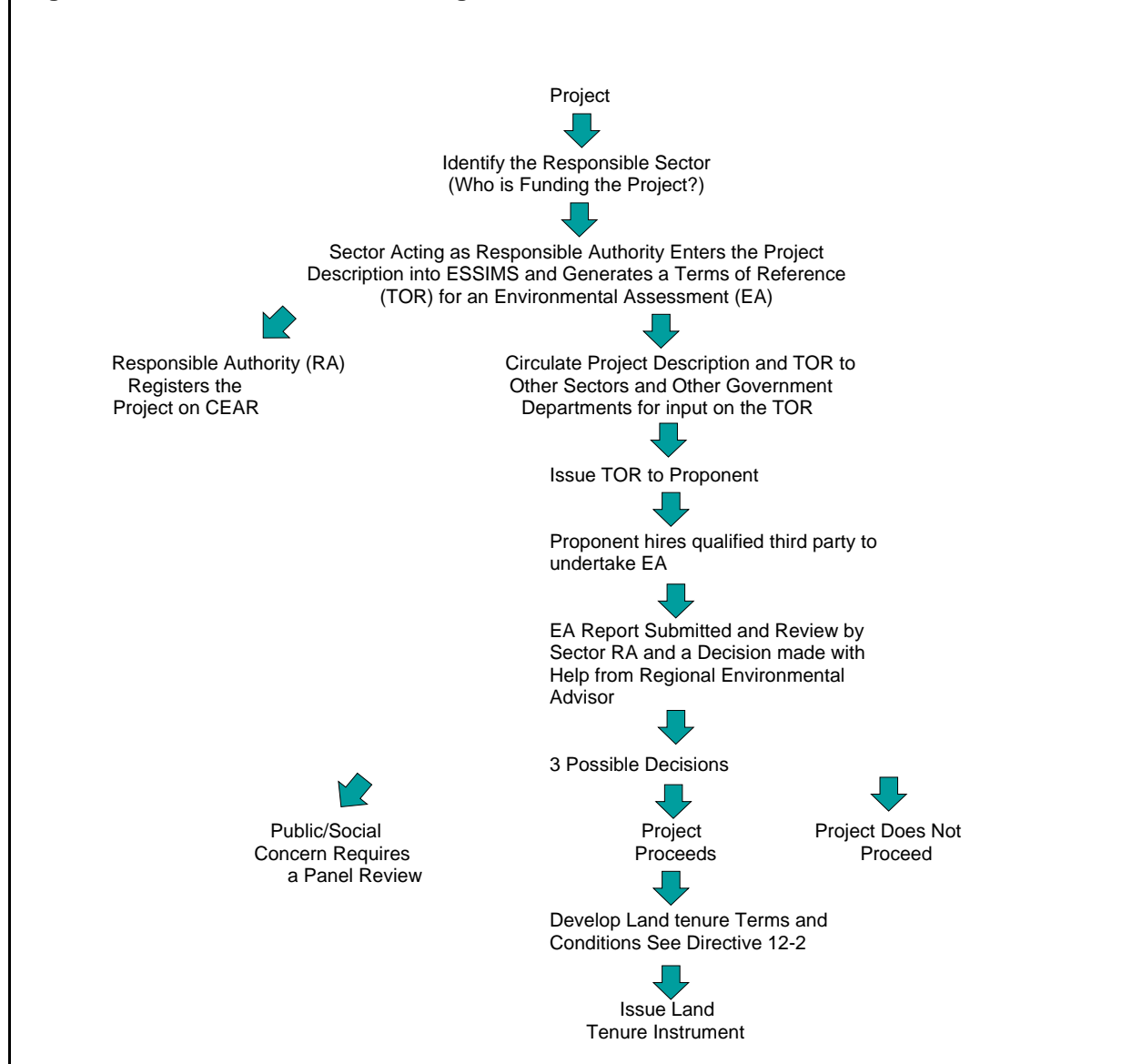
5.3 Identify the Responsible Authority (RA).

5.4 The *CEAA* requires the project description to be circulated to all applicable sectors and other government departments for input into the Terms of Reference (TOR) for the EA.



- 5.5 Check for a valid Environmental Site Assessment (ESA) or any other environmental reports on the file to identify the baseline conditions at the site.
- 5.6 Register the project with the Canadian Environmental Assessment Registry (CEAR).
- 5.7 Issue the TOR for the completion of an EA to the project proponent so that they can have the EA completed by a qualified assessor.
- 5.8 Review a copy of the completed EA report and input required data into ESSIMS to ensure the system record is complete and up-to-date. Make an EA screening decision to approve or reject the proposal.
- 5.9 Incorporate recommendations of the EA into the terms and conditions of the land instrument.
- 5.10 Draft the required land instrument.

Figure 12-2 Process for conducting environmental assessments



## 6.0 References

- 6.1 a) Chapter 2 (Choosing the Right Transaction: Authorities and Conditions)
- b) The Responsible Authority's Guide to the *Canadian Environmental Assessment Act* prepared by the Canadian Environmental Assessment Agency (CEAA) and associated reference guide. The CEA Agency website is also a useful reference; [www.ceaa-acee.gc.ca](http://www.ceaa-acee.gc.ca)
- c) Indian and Inuit Affairs Program - Introduction to Environment Manual Assessment training manual

- d) Environmental Stewardship Information Management System (ESSIMS) training manual
- e) Regional Environment Unit
- f) Annex 12-A: CEAA Triggers and Project Examples on First Nation Lands
- g) Considering Aboriginal Traditional Knowledge in environmental assessments conducted under the Canadian Environmental Assessment Act - Interim Principles; [www.ceaa.gc.ca/012/atk\\_e.htm](http://www.ceaa.gc.ca/012/atk_e.htm)

## DIRECTIVE 12-4 ENVIRONMENTAL SITE ASSESSMENTS

### 1.0 Purpose

- 1.1 This directive provides Regional Offices with an overview of the Environmental Site Assessment (ESA) process.

### 2.0 General

- 2.1 An ESA is required prior to issuing a land instrument involving First Nation lands and prior to the granting of reserve status to non-reserve lands. (An exception is an allotment without an attached project proposal).
- 2.2 ESAs must be undertaken in accordance with the *Canadian Standards Association (CSA)* standards.
- 2.3 A Phase I ESA (CSA Standard Z768-94) is used to identify actual and potential site contamination involving the evaluation and reporting of existing information collected through records review, site visit and interviews.
- 2.4 A Phase II ESA (CSA Standard Z769-00) is used to confirm and delineate, or to demonstrate the absence of, contamination on a property identified through a Phase I ESA procedure. The key technical feature that distinguished Phase I and Phase II ESAs is the use of quantitative sampling and analytical techniques used in Phase II studies.
- 2.5 It is not essential that a Phase I ESA be completed prior to conducting a Phase II ESA. In some instances, sufficient information and evidence may exist regarding potential contamination to proceed directly to a Phase II ESA.
- 2.6 Contaminated sites are not to be acquired, used or disposed of without negotiating specific conditions prior to the transaction.
- 2.7 Contaminated sites on First Nation lands identified by the ESA are to be managed in accordance with INAC's *Contaminated Sites Management Policy* and the *Indian and Inuit Affairs Program (IIAP) Contaminated Sites Management Program*.
- 2.8 Regions are responsible for the cost of completing ESAs where they are required in the absence of a proponent.
- 2.9 Upon the termination of a land instrument the site operator or proponent will bear the cost of an ESA.
- 2.10 If Regional Officers are still uncertain whether an ESA is required, the Environment Directorate at INAC Headquarters should be contacted.

- 2.11 The amount of time which has elapsed since the date that an ESA report was prepared must be considered when making decisions based on that report, as the likelihood that its contents accurately reflect the current environmental condition of the site may change over time. Refer to Directive 12-6 for a detailed description on the implementation of procedures regarding stale-dated environmental site assessments.

### **3.0 Authorities**

- 3.1 Indian and Inuit Affairs Business Line (IIABL) Environmental Management Directive, 2005
- 3.2 INAC's Contaminated Sites Management Policy
- 3.3 Indian and Inuit Affairs Program (IIAP) Contaminated Sites Management Program

### **4.0 Policy**

- 4.1 Regional Officers are required to ensure an ESA is completed where required prior to issuing, transferring, renewing or cancelling land instruments.

### **5.0 Process**

- 5.1 Determine if an ESA is required. If so, proceed with the following.
- 5.2 Collect existing environmental information related to the site (if available).
- 5.3 Decide who is responsible for funding the ESA.
- 5.4 Issue the terms of reference for the ESA. The ESA must be completed by a qualified assessor.
- 5.5 Obtain a copy of the completed report for the land instrument file.
- 5.6 Use the results of the report to draft terms and conditions for future land instruments or to refuse to issue an instrument if the land use proposal is inconsistent with the ESA findings or to terminate a land instrument.

### **6.0 References**

- 6.1 (a) Regional Environmental Unit.
- (b) Phase I Environmental Site Assessment CSA Standard Z768-94
- (c) Phase II Environmental Site Assessment CSA Standard Z769-00

## DIRECTIVE 12-5 ENVIRONMENTAL AUDITS

### 1.0 Purpose

- 1.1 This directive provides Regional Offices with an overview of the Environmental Audit process.

### 2.0 General

- 2.1 Environmental Audits, in most cases, will be used in the renewal of a land instrument.
- 2.2 Environmental Audits are undertaken to evaluate the level of compliance or conformance of a business or activity with all applicable environmental acts, regulations and environmental policy instruments.
- 2.3 The results of an Environmental Audit include a final report with findings and may include recommendations for improvements.
- 2.4 Land instruments issued to an existing facility must incorporate environmental terms and conditions based on the Environmental Audit. Environmental clauses may include the requirement to submit periodic environmental monitoring reports or annual audits.
- 2.5 Environmental Audits should be undertaken by qualified individuals who are not directly employed as regular staff by the site operator as per the CSA Z773 Environmental Compliance Auditing and CSA Z751 Environmental Auditing: Principles and General Practices.
- 2.6 Any non-compliance with applicable environmental standards which are identified by an Environmental Audit must be corrected by the proponent within 30 days of receipt of a copy of the Environmental Audit. No land instruments may be issued, renewed or transferred unless all instances of non-compliance identified by an Environmental Audit report have been remedied.

### 3.0 Authorities

- 3.1 (a) Environment Policy, Indian and Inuit Affairs Program, Oct. 2003
- (b) Deputy Minister's Memorandum on Environmental Stewardship for Indian and Inuit Affairs Program, Oct. 3, 2004
- (c) Indian and Inuit Affairs Business Line (IIABL) Environmental Management Directive, 2005

#### **4.0 Policy**

- 4.1 Environmental Audits will be used by Regional Officers to ensure compliance of existing operations with federal legislation and best practices prior to re-issuing land instruments.

#### **5.0 Process**

- 5.1 Identify any past terms and conditions that may have been applied to the operation and review for relevance.
- 5.2 Based upon the review of terms and conditions of a land instrument create a Terms of Reference (TOR) for the Environmental Audit.
- 5.3 Identify who is responsible for funding the Environmental Audit.
- 5.4 Provide the party responsible for the Environmental Audit with the TOR.
- 5.5 Obtain a copy of the completed Environmental Audit report and include it on the land instrument file.
- 5.6 Environmental Audit findings will be used to create terms and conditions and to determine whether to issue, renew or transfer a land instrument.

#### **6.0 References**

- 6.1 (a) Directives 12-2
- (b) Chapter 2 (Choosing the Right Transaction: Authorities and Conditions)
- (c) CSA Z773 Environmental Compliance Auditing
- (d) CSA Z751 Environmental Auditing: Principles and General Practices

**DIRECTIVE 12-6  
STALE-DATING ENVIRONMENTAL SITE  
ASSESSMENTS ON ADDITIONS TO RESERVES LANDS**

**1.0 Purpose**

- 1.1 This Directive provides guidance and direction to regional staff on a “stale-dating” process and criteria to be applicable to Phase I Environmental Sites Assessments (ESAs) under the Additions to Reserves (ATR) Policy.

**2.0 General**

- 2.1 In the November 2005 Auditor General , s.7.36 recommended that INAC issue a nationally consistent approach with respect to stale-dated ESAs that sets out criteria for Departmental officials to follow when carrying out such environmental reviews. Such an approach would set out specific time frames while at the same time allow for discretion by personnel to determine whether updates are necessary. The Departmental response to the Auditor General’s recommendation was a commitment to have in place within Chapter 12 of the Land Management Manual (LMM) a clearly articulated policy on what will be considered a “stale-dated” ESA.
- 2.2 This Directive is based on the principles of risk management and due diligence and takes into account potential environmental liabilities and time frames prior to approving the addition of lands to reserves under the ATR Policy and prior to the transfer of land to reserve status.

**3.0 Authorities**

- 3.1 *The Federal Real Property and Immovables Act*  
3.2 INAC Environmental Stewardship Strategy, 2002  
3.3 Deputy Minister’s Memorandum on Environmental Stewardship, 2004  
3.4 Environment Policy, Indian and Inuit Affairs Program, 2003  
3.5 Indian and Inuit Affairs Business Line (IIABL) Environmental Management Directive, 2005  
3.6 Treasury Board Real Property Environment Policy, s. 5 (b)



## 4.0 Policy

- 4.1 ESAs are required as part of an environmental review of lands prior to coming into reserve status in accordance with the Additions to Reserves policy outlined in the LMM, the Indian and Inuit Affairs Business Line (IIABL) Environment Policy and Environmental Management Directive.
- 4.2 As part of an environmental review of lands prior to coming into reserve status, the process requires at a minimum, a Phase 1 ESA of a property selected to determine if any past activities have adversely affected the land. However, because the process of transferring land to reserve status may take longer than anticipated, the ESA may no longer be considered valid and would be considered to be stale-dated requiring a re-assessment to determine if any ongoing or new potential risks may expose INAC to further liability.
- 4.3 In accordance with s. 2.1, Annex A and 5.1 Annex C of Chapter 10 of INAC's LMM and the Treasury Board Real Property Environment Policy, the Department must ensure that an environmental review is completed on all lands at the beginning of the proposed acquisition, prior to the transfer of land to reserve status.
- 4.4 In meeting the requirement of an environmental review, the Department shall undertake an ESA in compliance with the IIABL Environment Policy and Environmental Management Directive.
- 4.5 All ESAs should be in conformance with the most recent version of the Canadian Standards Association (CSA), standards Z768 and Z769, and treaty land entitlement framework agreements, or provincial standards if more stringent.
- 4.6 All ESAs shall include recommendations for Departmental action regarding the identification of risk, contingent liabilities and options for re-assessment if there are unforeseen delays in the addition of lands to reserves.

## 5.0 Criteria and Process

The regional ATR committee shall ensure that all phases of an ESA are undertaken by a qualified assessor including recommendations for re-assessment of past ESAs. The regional ATR committee may upon evidence of experience assign a Departmental Regional Officer to act as a qualified assessor for Phase I ESAs only, including recommending re-assessment of past Phase I ESAs. The regional ATR committee based on the results of the environmental review will provide a recommendation for approval of the ATR proposal to the RDG, as part of the approval process detailed in Chapter 10-1, Annex 'D' of the LMM.

## 5.1 Criteria

Generally, Phase 1 ESAs completed as part of an environmental review of lands prior to coming into reserve status which are 5 years and older will be deemed to be stale-dated and will require a re-assessment. This re-assessment may consist of a file review and depending on the results of the file review, a site visit may or may not be required. Re-assessments on all or part of a property may also be conducted at any time within the maximum 5 year time frame at the discretion of a qualified assessor based on the criteria listed below:

- a. Land use and types of activities that have occurred on the property:**  
If the land use or types of activities on the property in question or surrounding properties have changed, the existing Phase I ESA information should be re-assessed to ensure that it is still valid/current and can be used to evaluate risks and remediation requirements under current site conditions. Proposed land use needs to be carefully considered as well.
- b. Change in conditions and type of property and surrounding property:**  
Where there has been a change or suspected change in conditions of the property and/or if there have been changes or suspected changes in the type or condition of surrounding properties since the completion of the previous Phase 1 ESA, a re-assessment is required to determine if the existing information can still be used to evaluate risks and remediation requirements.
- c. Changes in environmental legislation and policies:**  
Where environmental legislation or policies have changed since the completion of the previous Phase I ESA, then a re-assessment should be required to determine if the existing information is appropriate to use.
- d. Remoteness:**  
Consideration of the remoteness of the property in question must be taken into account when deciding whether or not to re-assess all or part of the property.
- e. Accessibility:**  
The accessibility of the property in question must be taken into account when deciding whether or not to re-assess all or part of the property.
- f. Other Factors:**  
Other factors may also affect the use of existing information. A qualified assessor may be required to evaluate the validity of past Phase I ESA information on a site-by-site basis or in addition, determine if it is necessary to only re-assess a portion of the land in question.

## 5.2 Process

Based on the consideration of the above criteria and a re-assessment being warranted, the following process shall be undertaken to determine the scope of the re-assessment required:

### a) File Review:

At a minimum, a file review shall be undertaken by the assigned qualified assessor to ensure that all actions as recommended in the initial Phase I ESA have been taken. This includes but is not limited to conducting a review of any existing information stored in departmental databases, such as the Environmental Stewardship Strategy Information Management System (ESSIMS) that may not have been in existence at the time of the initial Phase 1 ESA. The file review can also include a signed statement from the First Nation Chief and Council attesting that no changes or new developments have occurred on the land selection since the initial Phase I ESA was completed.

If the file review is satisfactory, there should be no need for additional re-assessment at this time. However, in cases where the file review suggests a need for a site visit, this should be carried out immediately.

### b) Site Visit:

Where appropriate, a site visit may be required to document by visual inspection any issues or concerns related to any of the above criteria.

## 6.0 References

- 6.1 a) CSA standards Z768 and Z769
- b) Land Management Manual - Chapter 10, Additions to Reserve

## **7.0 Definitions**

### Environmental Reviews

A review undertaken under the ATR policy which can consist of, but is not limited to, a file review or an Environmental Site Assessment, (ESA) Phase I, II and/or III. In accordance with s.5 (b) of the Treasury Board Real Property Environment Policy, before acquiring real property, departments must ascertain the environmental condition of the property and determine whether it is or can be made environmentally compatible with its intended use.

For further definitions see Chapter 10 and Chapter 12 of the Land Management Manual.

## ANNEX 12-A

## CEAA TRIGGERS AND PROJECT EXAMPLES ON FIRST NATION LANDS

<b>A. The Department or First Nation is the proponent of the project (as defined under the CEAA).</b>	
<b>B. The Department is providing financial assistance to the project.</b>	
<b>C. The Department is granting an interest in land:</b>	
B	Issuance of a Certificate of Possession for the purpose of enabling a First Nation member to construct a dwelling or other building unless the dwelling or building is exempt by virtue of the <i>Exclusion List Regulations (Indian Act, Section 20)</i>
B	A sale/lease of surrendered lands ( <i>Indian Act, Section 53(1)</i> )
B	A lease to a third party of land allotted to a band member ( <i>Indian Act, Section 58(3)</i> )
<b>D. The Department is performing a regulatory duty:</b>	
B	Authorization to use First Nation lands for the purpose of Indian schools, administration of Indian affairs, Indian burial grounds or Indian health projects ( <i>Indian Act, Subsection 18(2)</i> )
B	Issuance of a permit for occupation or use of First Nation land ( <i>Indian Act, Subsection 28(2)</i> )
B	Issuance of a permit for the disposal of sand, gravel, clay or other non-metallic substances, or the taking of these materials, on or under First Nation lands ( <i>Indian Act, Subsection 58(4)</i> )
B	Issuance of a permit or lease for the exploration or development of minerals ( <i>Indian Mining Regulations, Subsections 5(2), 6(1)</i> )
B	Issuance of a permit to operate a garbage dump or to dispose, store, or burn waste on First Nation lands ( <i>Indian Reserve Waste Disposal Regulations, Section 5</i> )
B	Issuance of a permit to First Nation members to cut timber for sale ( <i>Indian Timber Regulations, Subsection 5(1)</i> )
B	Issuance of or variation to the terms of a licence for cutting and removing timber from First Nation lands ( <i>Indian Timber Regulations, Section 9 &amp; Subsection 22(1)</i> )
B	Issuance of surface leases or rights-of-way required to exercise rights granted under an oil and gas lease/permit ( <i>Indian Oil and Gas Regulations, Subsection 27(4)</i> )
B	Issuance of a licence to conduct exploratory work on First Nation lands ( <i>Indian Oil and Gas Regulations, 6(4)</i> )
B	Issuance of a temporary right of entry on First Nation lands pending the granting of a surface lease for oil or gas ( <i>Indian Oil and Gas Regulations, 32(1)</i> )
B	Issuance of a lease authorizing the production of crude bitumen ( <i>Indian Oil and Gas Regulations, 39(1)</i> )
B	Amendment of a lease permit to provide for production of crude bitumen ( <i>Indian Oil and Gas Regulations, 39(3)</i> )
<b>E. The Department recommends the Governor in Council perform a regulatory duty:</b>	
B	Taking of lands by local authorities ( <i>Indian Act, Subsection 35(1)</i> )
B	Acceptance of an absolute surrender or designation ( <i>Indian Act, Subsection 39(1)(c)</i> )

## ANNEX 12-B

### GLOSSARY

- G Best Environmental Practice** means the application of the best available knowledge, processes and techniques. The knowledge, processes and techniques applied are not specific to any one piece of legislation or to any one environmental assessment regime but rather to the most appropriate combination of measures.
- G Contaminated Site** means a site at which substances occur at concentrations: (1) above background levels and pose or are likely to pose an immediate or long-term hazard to human health or to the environment; or, (2) exceeding levels specified in policies and regulations.
- G Contamination** means the introduction into soil, air, or water of a chemical, organic or radioactive material or live organism that will adversely affect the quality of that medium.
- G Environmental Assessment** means an assessment, conducted in accordance with the *Canadian Environmental Assessment Act (CEAA)* and its regulations, of the effects of a proposed project on the bio-physical environment and the social and economic environments of the people to be affected. It proposes preventative or corrective measures to reduce undesirable changes in the natural environment that may be identified during the assessment of a proposed project.
- G Environmental Audit** means an assessment of an existing structure, facility or activity's compliance and conformance to all pertinent environmental legislation, standards and regulations. It is a methodical examination that may involve sampling, tests, analyses and confirmation of the practices and procedures of an operation.
- G Environmental Management Process** is a process used to assess the environmental performance of an activity or site and includes Environmental Assessment, Environmental Site Assessment and Environmental Audit.
- G Environmental Site Assessment** means an assessment of the existing conditions of a specific property to determine and report on its physical environmental condition. The assessment identifies and evaluates any possible environmental problems on the property that may affect the real value or potential use of the property. The assessment follows an accepted protocol such as CSA Z768-94 Phase I Environmental Site Assessment or CSA Z769-00 Phase II Environmental Site Assessment.

- G Federal Authority** under the *CEAA* includes a federal minister of the Crown; an agency or other body of the federal government that is ultimately accountable to parliament through a federal Minister of the Crown; any federal department or departmental corporation set out in schedule I or II to the *Financial Administration Act*; or any other body prescribed in the regulations to the *Act*. The following are not federal authorities under the *Act*: the government of the Yukon or Northwest Territories; a First Nation or First Nation Council under the *Indian Act*; harbour commissions; and Crown corporations within the meaning of the *Federal Administration Act*.
- G Mitigation, Mitigating (Mitigative) Measures** means the elimination, reduction, or control of the adverse environmental effects of the project, including restitution for any damage to the environment caused by such effects through replacement, restoration, compensation, or any other means.
- G Project** means in relation to physical work, any proposed construction, operation, modification, decommissioning, abandonment, or other undertaking in relation to that physical work; or any proposed physical activity, not relating to physical work, which is prescribed in the *Inclusion List Regulations of the CEAA*.
- G Proponent** means the person, body, federal authority or government that proposes the project.
- G Qualified Assessor** means a person or business who, through a combination of education and work experience, has acquired an in-depth knowledge and understanding of bio-physical research, assessment and testing. To conduct an assessment of a site the assessor cannot be directly employed as a regular or casual employee of the site operator.
- G Remediation** means the improvement of a contaminated site to prevent, minimize or mitigate damage to human health or the environment. Remediation involves the development and application of a planned approach that removes, destroys, contains or otherwise reduces the availability of contaminants to receptors of concern.
- G Responsible Authority** means a federal authority that has either proposed the project or requested to provide support or approval in the form of funding, land, permit, license, or other approval specified by regulations.

**G Screening** means an environmental assessment that is conducted pursuant to section 18 of the *CEAA*, including considerations of the factors set out in subsection 16(1) of the *Act*.

**G Screening Report** means the report that summarizes the results of the environmental assessment screening.

**G Suitability** means the appropriateness of a land base for intended use as determined by an Environmental Assessment, an Environmental Site Assessment, possible previous contamination or potential for negative affects on species at risk.

**G Trigger** means an action by a federal authority that initiates the need for an environmental assessment under the *CEAA*. Triggers is one or more of the following duties, powers, or functions in relation to a project:

- G** proposes the project;
- G** grants money or other financial assistance to a project;
- G** grants an interest in land for a project;
- G** exercises a regulatory duty in relation to a project, such as issuing a permit or licence, that is included in the Law List prescribed in the *CEAA*'s regulations; or
- G** recommends that the Governor in Council perform a regulatory duty.

**G “Aboriginal Traditional Knowledge”** means knowledge that is held by, and unique to, Aboriginal Peoples.

**Note:** The term “traditional ecological knowledge” is used interchangeably with Aboriginal traditional knowledge.

For more information on “Considering Aboriginal Traditional Knowledge in Environmental Assessments” see [http://www.ceaa.gc.ca/012/atk\\_e.htm](http://www.ceaa.gc.ca/012/atk_e.htm)



## ANNEX 12-C LEGISLATION AND POLICY REQUIREMENTS

**Canadian Environmental Assessment Act (CEAA)** - sections 5.1 and 5.2 applies to projects on First Nation lands, where a federal department (usually INAC):

- is the proponent of a project;
- is granting an interest in land;
- is performing a regulatory duty;
- is providing financial assistance; or
- is recommending that the Governor in Council perform a regulatory duty.

**Granting an interest in land** - means issuing a permit, licence or lease for occupation or use of First Nation lands.

**Performing a regulatory duty** - means issuing a permit, licence or other form of authorization that is required for the activity under federal legislation such as the *Indian Act* and its regulations.

*CEAA* applies on First Nation lands, as it does on any federally administered land in Canada. If any of the above is being done to a project on First Nation lands, the *CEAA* requires that an Environmental Assessment be conducted before making a decision to renew or issue an instrument.

**Canadian Environmental Protection Act (CEPA)** - includes provisions for the identification and characterization of “toxic substances.” Under the *Act*, “cradle-to-grave” management plans must be developed for the control, reduction or elimination of toxic substances. Environment Canada publishes updated lists of toxic substances. The *Act* provides for the development of regulations to control pollution on federally administered and First Nation lands. Under *CEPA*, it is the responsibility of any operator or property owner to report a release (or possible release) of a toxic substance. A regulation under *CEPA* requires the registration of petroleum product storage tank systems. Another regulation specifies requirements for the storage of PCB materials.

**Environmental Stewardship Strategy Information Management System (ESSIMS)**

- The Environmental Assessment (EA) component of ESSIMS is designed to assist the department in its role as a Responsible Authority (RA) and can be used to effectively and efficiently aid in the environmental scoping process and to track a variety of environmental assessment process.

**Environmental Stewardship Strategy (ESS)** - The Indian and Inuit Affairs Program Environmental Stewardship Strategy, approved in 2002, is an integral part of the department's Sustainable Development Strategy (SDS). The ESS is an inter-sectoral plan of action to ensure that environmental concerns are addressed and sound environmental management practices become an integral component of departmental operations. It represents the department's commitment to demonstrating leadership in environmental stewardship to protect the health and safety of First Nations and Inuit and the environmental integrity of First Nation lands. The Strategy sets out a number of principles that are identified in the Environmental Policy.

**Environmental Policy** - The environmental policy, approved in October 2003, sets up key principles and objectives to guide the implementation of the ESS. It recognizes that environmental management responsibilities are shared between the government and First Nations, and that to be a good partner, INAC must keep its own house in order. Some of the key principles that are relevant to environment assessment include:

- Adopting a holistic approach in information sharing with Aboriginal communities;
- Adopting principles such as "proponent pays" and "polluter pays";
- Following all federal environmental standards where they exist;
- Meeting or exceeding standards of surrounding provincial jurisdiction, if federal standards do not exist;
- Adopting best environmental practices.

The policy contains 5 objectives, all of which are highly relevant to EA:

- Sectors and regions are responsible for addressing and resourcing the environmental implications of their own activities;
- Pollution prevention is to be considered in the earliest stages of a project, activity or regulatory duty;

- Projects/activities will meet or exceed all applicable federal or provincial laws, standards and regulations;
- INAC will ensure accountability of its data collection, verification, storage and reporting; and
- Monitoring and evaluation will be conducted to ensure continual improvement.

***Fisheries Act*** - is the main regulatory tool used by the federal government to manage the fisheries resource in both marine (offshore) and freshwater (inland) environments. The *Fisheries Act* is used as a means of protecting not only fish habitat but water quality as well. The *Fisheries Act* prohibits: (1) carrying out any activity that results in the harmful alteration, disruption or destruction of fish habitat; and (2) depositing a harmful substance into a water body containing fish. The *Act* is administered by the Department of Fisheries and Oceans.

***Migratory Birds Convention Act (MBCA)*** - Under the *MBCA* (1994), hunting of migratory birds is prohibited except with a federal permit under the *Act*. Migratory birds include most waterfowl, geese, songbirds and raptors (hawks, etc.). Furthermore, no person shall disturb, destroy or take a nest or egg of migratory bird, or have in their possession a live migratory bird or its carcass except under authority of a permit.

***Species at Risk Act (SARA)*** - The overall goal of *SARA* is to prevent wildlife species from becoming extinct or lost from the wild, and to help in the recovery of species that are at risk of becoming extinct as a result of human activities. If a species is listed as endangered or threatened, a number of binding provisions take effect. The *Act* prohibits the destruction of critical habitat of endangered and threatened species found on federal lands. The *Act* also prohibits any person from killing, harming, harassing, or capturing an individual of a listed wildlife species. The *Act* is administered mainly by Environment Canada and the Department of Fisheries and Oceans.

## INDEX TO CHAPTER 13

### SUBMISSIONS TO THE GOVERNOR IN COUNCIL

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## **Directive Respecting Submissions to the Governor in Council**

### **1. Purpose**

- 1.1 The purpose of this directive is to provide general guidelines and procedures for those who are involved in the preparation of order in council submissions to the Governor in Council.

### **2. General**

- 2.1 The Department of Indian Affairs and Northern Development prepares a wide variety of Orders in Council (OICs) under two broad categories, i.e. non-regulatory Orders in Council and regulatory Orders in Council.
- 2.2 Non-regulatory Orders in Council range from issues such as creations and additions to reserves, designations, transfer of lands from the Federal Crown to a provincial/territorial government and devolution of Land Management to First Nations. OICs are also used for numerous federal appointments, notably Deputy Ministers, Head of Crown Corporation and various Boards and Agencies.
- 2.3 Regulatory Orders in Council put in place new regulations or amend existing regulations under enabling statutes, e.g. prohibition orders under the Yukon Quartz and Yukon Placer Mining Acts, Indian Band Election Regulations and Indian Referendum Regulations. In certain cases an Order in Council may accompany a Treasury Board submission e.g. seeking authority for the Minister of Indian Affairs and Northern Development to sign an agreement on behalf of Canada or seeking Treasury Board approval to change the fee structure prescribed under certain regulations.

### **3. Definition**

- 3.1. What are Orders in Council?
- 3.2. An Order in Council is an Order of the Governor General acting by and with the advice of Cabinet. It is made where a statute calls for action by the Governor in Council.
- 3.3. All Orders in Council (OICs), with the exception of the orders made pursuant to Royal Prerogative, are made by authority of an Act of Parliament which confers the necessary authority upon the Governor in Council. All Orders in Council are made on the recommendation of democratically elected Ministers of the Crown, acting collectively as the Queen's Privy Council.
- 3.4. Official passage of OICs requires the signature of four Ministers and the Governor General. In practice, most Orders in Council are approved by the Special Committee of Council, a Cabinet Committee chaired by the most Senior Minister to ensure they are consistent with the policy of the government.

### **4. The Special Committee of Council (SCC)**

- 4.1. The Special Committee of Council (SCC) was established by the Prime Minister to review and approve proposed Governor in Council decisions, such as Regulations and a series of non-regulatory Orders not involving any question of major policy or any new factor which had not been previously considered by Cabinet. SCC also authorizes the pre-publication of proposed Regulations.
- 4.2. SCC is a body of nine Ministers, and is presided over by the senior Minister present. The quorum is four Ministers and was established in a Memorandum regarding certain functions of the Prime Minister made by Order in Council P.C. 1935-3374 of October 25, 1935.

## 5. Critical Periods for Approval of Submissions

- 5.1 The Order in Council Division has three extremely hectic periods:
- the end of the fiscal year (March);
  - the House of Commons Summer recess (towards the end of June);
  - the end of the calendar year (December).
- 5.2 Departmental submissions can be processed all summer. During the House of Commons' recess, SCC meetings are usually held once a month.
- 5.3 The SCC meets each week to approve an average of 40 Orders in Council of which about 75 percent are considered of "administrative" nature.
- 5.4 The Privy Council Office Net Site address is:  
**[http://canada.gc.ca/howgoc/oic/iand\\_e.html](http://canada.gc.ca/howgoc/oic/iand_e.html)**  
This net site can be accessed to retrieve information on the current approved orders in council.

## 6. Authorities

- 6.1 Order in council submissions pursuant to sections 35, 40 and 60 of the *Indian Act* must be authorized by the Governor in Council. The creation of or an addition to a reserve is not a transaction under the *Indian Act*. Creations and additions are authorized under the Crown's Royal Prerogative.

## 7. Policy

7.1 The chapters in the Land Management Manual Volume 1 serve as a guide for headquarters staff, regions as well as the First Nations who manage reserve lands under the delegated authority. Each chapter provides the policy and procedural requirements that need to be completed prior to drafting an order in council submission. The chapters are as follows:

- Chapter 5: Designations and Surrenders (Section 40)
- Chapter 7: Leases: Drafting, Issuing and Cancelling
- Chapter 9: Land Transactions Under Section 35
- Chapter 10: Reserve Creations and Additions
- Chapter 11: Devolution of Land Management to First Nations (Section 60)

## 8. Process

8.1 The documentation for submission to the Governor in Council consists of:

- Executive Summary - internal document for the department;
- Submission Fact Sheet (required for creations/additions only) and Map;
- Transmittal Letter to Assistant Clerk of the Privy Council;
- Explanatory Note (Bilingual);
- Recommendation by the Minister of Indian Affairs and Northern Development (Bilingual);
- Draft Order (Bilingual);
- Schedule (NR Can Legal Land Descriptions) (Bilingual).



## **9. Executive Summary**

- 9.1 The Executive Summary is an internal document used to brief our senior management within the Department and the Minister. This document provides information under the headings: priority, subject, request to Governor in Council, resource implications, background, environmental review, third-party interests, Department of Justice and attachments.

**Executive Summary (continued)**

- 9.2 The attachments section in the Executive Summary lists the background documents/information for our senior management only. It includes band council resolutions, vote results and certifications, approval letters from Justice, approvals from Additions Committees, etc.

**10. Submission Fact Sheet (New Reserves/Additions Only) and Map**

- 10.1 The Submission Fact Sheet provides information on new reserves and additions to reserve only such as:
- Is this contiguous or noncontiguous to the First Nation's main reserve?
  - Name of Rural Municipality, Urban Municipality or Northern Administration District.
  - Identification of electoral district and name of Member of Parliament.
  - List of third party interests and how they have been addressed.
  - The map reflects the approximate location of the proposed new reserve/addition to reserve as a visual aid.
  - Summarize the proposal.
  - Have checklist requirements been satisfied?
  - Identify how any consultations/communications controversies, costing or other major issues have been managed.

**11. Transmittal Letter**

- 11.1 This letter should be addressed to the Assistant Clerk of the Privy Council (Orders in Council) and should briefly describe the context and nature of the request being made to the Governor in Council. It should indicate if there are any direct or indirect financial implications involved for which Treasury Board approval is required. The letter should be on Assistant Deputy Minister (ADM) letterhead and signed by the Sector ADM or Director General (DG) if ADM is not available.

## **12. Explanatory Note (Bilingual Format)**

- 12.1 The Explanatory Note is not part of the Order in Council. However, the note is prepared to serve as a briefing tool for Ministers of the Special Committee of Council which provides in greater detail of the contents of the submission including; purpose, background, federal-provincial implications, financial implications, consultations undertaken, policy implications, communication strategies and departmental contact.
- 12.2 This is a stand alone document, the SCC Ministers obtain a copy of this explanatory note only and no other part of the submission.

## **13. Recommendation by the Minister of Indian Affairs and Northern Development (Bilingual Format)**

- 13.1 The letter of recommendation to the Governor in Council must be clear, concise and cite the enabling authority pursuant to which the request is being initiated, and must be on Ministerial letterhead. This document is very important as it is the formal request by the Minister to the Governor in Council for the issuance of the Order in Council.

## **14. Draft Order (Bilingual Format)**

- 14.1 The Draft Order is a document which requires approval by the Governor in Council before it becomes a statutory instrument.
- 14.2 The non-regulatory Draft Orders are usually printed on plain white paper and must be consistent with recommended citations.
- 14.3 The regulatory Draft Orders must be “blue-stamped” by the Department of Justice (Legal Services in some cases) prior to it being processed by the Privy Council Office.

## **15. Schedule**

- 15.1 If a schedule is referenced in the draft order it must accompany the draft order to Privy Council Office. A schedule may be in the form of an easement, settlement agreement, right of way agreement, Designation, legal land descriptions prepared by Natural Resources Canada (NRCan) and other types of instruments requiring approval by the Governor in Council. The department must ensure that any NR Can legal land descriptions that accompany a draft order must be prepared in both official languages for Privy Council Office.

## **16. Red Jacket Retained in Department**

- 16.1 After the Minister has signed the recommendation, the red jacket with the background information and Executive Summary are retained in the department by the Departmental Submission Coordinator, Linda MacNeil for future reference at (819) 994-6825.

## **17. Conclusion**

- 17.1 In this Directive, Lands Directorate in Ottawa is responsible for developing and maintaining the Order in Council (OIC) Submission Book and accompanying templates. This OIC book provides instructions for order in council preparation as well as templates for a variety of land transactions such as creation of new reserves/additions to reserves, designations, section 35 transactions and section 60 delegation of Land Management authority to First Nations. The OIC submission book and templates are amended on an annual basis and updated versions are provided to all Regional Lands and Trust Services OIC coordinators for distribution to the appropriate regional staff.
- 17.2 Lands Directorate develops, maintains and updates templates for Saskatchewan Treaty Land Entitlement and Manitoba Treaty Land Entitlement pursuant to the respective Framework Agreements for the settlement of outstanding treaty land entitlement claims and the fulfilment of Canada's treaty obligations.

## **18. Implementation**

- 18.1 This directive takes effect on the date of release and will continue to apply until it is replaced by another directive.

## **19. Contacts**

- 19.1 Any questions with respect to this Directive should be directed to the Manager of Policy Operations and Land Management, Lands Directorate, at 819-994-6720.

To be amended at a later date.

To be amended at a later date.